In The

UNITED STATES CIRCUIT COURT OF APPEALS

For The Ninth Circuit. 3

No. 10108

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. MONTGOMERY WARD & COMPANY, Respondent.	Upon Petition for Enforcement and Upon Cross-Petition for Review and to Set Aside an Order of the National Labor Relations Board.
MONTGOMERY WARD & COMPANY, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	

BRIEF OF MONTGOMERY WARD & CO., INCORPORATED, UPON ITS PETITION FOR REVIEW AND TO SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

FILED
JUL C - 1942
PAUL P. O'BRIEN,
CLERK

STUART S. BALL,
619 West Chicago Avenue,
Chicago, Illinois,
Attorney for Petitioner.

SUBJECT INDEX.

	PAGE
Table of Cases	i
Statement as to Jurisdiction	2
Statement of the Case	2
Specification of Errors Relied Upon	5
Summary	10
Argument	11

TABLE OF CASES.

	PAGE
Agwilines, Inc. v. NLRB, (5th cir.), 87 Fed. (2d) 146	19
Allied Yarns Corp., In re; 26 NLRB at p. 1451	45
Art Metals Constr. Co. v. NLRB, (2d cir.), 110 Fed. (2d) 148	12, 24, 27
Bank of the U. S. v. Dandridge, 12 Wheat. (U. S.) 64	35
Beckerman Shoe Corp., In re; 21 NLRB 1222	63
Bethlehem Shipbuilding Corp., Ltd. v. NLRB, (1st cir.), 114 Fed. (2d) 930 (Appeal dismissed 312 U. S. 710, 61 S. Ct. 448, 85 L. Ed. 1141)	15, 24
Black Diamond Steamship Corp. v. NLRB, (2d cir.), 94 Fed. (2d) 875 (cert. den. 304 U. S. 579, 58 S. Ct. 1044, 82 L. Ed. 1542)	16
Colorado Fuel & Iron Corp. v. NLRB, (10th cir.), 121 Fed. (2d) 165	18
Continental Oil Co. v. NLRB, (10th cir.), 113 Fed. (2d) 473 (cert. granted on another point, 311 U. S. 637, 61 S. Ct. 72, 85 L. Ed. 406)	15, 24, 34

District of Columbia v. Murphy and District of Columbia v. De Hart, (Dec. 15, 1941), 314 U. S. 441, 62 S. Ct. 303, 86 L. Ed. 277 65

Ford Motor Co. v. NLRB, 305 U. S. 364, 59 S. Ct. 301, 83 L. Ed. 221 64

Ft. Wayne Corrugated Paper Co. v. NLRB, (7th cir.), 111 Fed. (2d) 869 24

F. W. Poe Mfg. Co. v. NLRB, (4th cir.), 119 Fed. (2d) 45 47

Globe Cotton Mills v. NLRB, (5th cir.), 103 Fed. (2d) 91 22, 28, 44

Great Southern Trucking Co. v. NLRB, (4th cir.), 127 Fed. (2d) 180 17, 18

Hartsell Mills Co. v. NLRB, (4th cir.), 111 Fed. (2d) 291 15, 20, 24

H. J. Heinz Co. v. NLRB, 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309 24, 43, 69

Inland Lime & Stone Co. v. NLRB, (7th cir.), 119 Fed. (2d) 20 17, 20, 23

International Assn. of Machinists v. NLRB, 311 U. S. 72, 61 S. Ct. 83, 85 L. Ed. 50 69

Jeffery-DeWitt Insulator Co. v. NLRB, (4th cir.), 91 Fed. (2d) 134 (cert. den. 302 U. S. 731, 58 S. Ct. 55) 21

McQuay-Norris Mfg. Co. v. NLRB, (7th cir.), 116 Fed. (2d) 748 (cert. den. 313 U. S. 565, 61 S. Ct. 843, 85 L. Ed. 1524) 15, 44

M. H. Ritzwoller Co. v. NLRB, (7th cir.), 114 Fed. (2d) 432 14, 20

National Licorice Co. v. NLRB, 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799 15, 21

NLRB v. Acme Air Appliance Co., Inc., (2d cir.), 117 Fed. (2d) 417 17

NLRB v. American Mfg. Co., (2d cir.), 106 Fed. (2d) 61 (Affirmed but modified 309 U. S. 629, 60 S. Ct. 612, 84 L. Ed. 988) 16, 17
NLRB v. Bachelder, (7th cir.), 120 Fed. (2d) 574 (cert. den. 314 U. S. 647, 62 S. Ct. 90, 86 L. Ed. 79) 14, 21
NLRB v. Biles Coleman Lumber Co., (9th cir.), 98 Fed. (2d) 18 17
NLRB v. Boss Mfg. Co., (7th cir.), 118 Fed. (2d) 187 20, 23, 25, 34
NLRB v. Boss Mfg. Co., (7th cir.), 107 Fed. (2d) 574 15
NLRB v. Calumet Steel Division of Borg-Warner Corp., (7th cir.), 121 Fed. (2d) 366 15, 25
NLRB v. Carlisle Lumber Co., (9th cir.), 94 Fed. (2d) 138 (cert. den. 304 U. S. 575, 58 S. Ct. 1045, 82 L. Ed. 1539) 30, 40
NLRB v. Chicago Apparatus Co., (7th cir.), 116 Fed. (2d) 753 16
NLRB v. Clarksburg Pub'g Co., (4th cir.), 120 Fed. (2d) 976 20
NLRB v. Columbian Enameling & Stamping Co., 306 U. S. 292, 59 S. Ct. 501, 83 L. Ed. 660 34
NLRB v. Dahlstrom Metallic Door Co., (2d cir.), 112 Fed. (2d) 756 14
NLRB v. Dixie Motor Coach Corp., (5th cir.), — Fed. (2d), at p. (May 27, 1942) 19
NLRB v. Express Publishing Co., (5th cir.), 111 Fed. (2d) 588, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930) 20, 28, 30
NLRB v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014 18
NLRB v. Federbush Co., Inc., (2d cir.), 121 Fed. (2d) 954 14
NLRB v. George P. Pilling & Son Co., (3d cir.), 119 Fed. (2d) 32 16, 17, 20

NLRB v. Gerity Whitaker Co., (6th cir.), ...Fed. (2d), June 1, 1942 (Per curiam opinion; facts set forth in 33 NLRB No. 78) 17
NLRB v. Griswold Mfg. Co., (3d cir.), 106 Fed. (2d) 713 16
NLRB v. Grower-Shipper Vegetable Ass'n of Central California, (9th cir.), 122 Fed. (2d) 368 63
NLRB v. Highland Park Mfg. Co., (4th cir.), 110 Fed. (2d) 632 22, 24, 28
NLRB v. Highland Shoe, Inc., (1st cir.), 119 Fed. (2d) 218 16
NLRB v. Hopwood Retinning Co., (2d cir.), 98 Fed. (2d) 97 16, 24
NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 12, 26, 27
NLRB v. Knoxville Pub'g Co., (6th cir.), 124 Fed. (2d) 875 22, 28, 35, 48
NLRB v. Lane Cotton Mills Co., (5th cir.), 111 Fed. (2d) 814 (Appeal dismissed 311 U. S. 723, 61 S. Ct. 316, 85 L. Ed. 471) 14-15
NLRB v. Lightner Publishing Corp. of Illinois, (7th cir.), 113 Fed. (2d) 621 17, 30
NLRB v. Link-Belt Co., 311 U. S. 584, 61 S. Ct. 358, 85 L. Ed. 368 69
NLRB v. Louisville Refining Co., (6th cir.), 102 Fed. (2d) 678 (cert. den. 308 U. S. 568, 60 S. Ct. 81, 84 L. Ed. 477) 14, 25
NLRB v. Moench Tanning Co., (2d cir.), 121 Fed. (2d) 951 15, 24
NLRB v. Moltrup Steel Products Co., (3d cir.), 121 Fed. (2d) 612 14
NLRB v. Mackay Radio & Telegraph Co., 304 U. S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 57
NLRB v. National Motor Bearing Co., (9th cir.), 105 Fed. (2d) 652 18

NLRB v. National Seal Corp., (2d cir.), 127 Fed. (2d) 776 14, 20, 24
NLRB v. New Era Die Co., Inc. (3d cir.), 118 Fed. (2d) 500 14, 17
NLRB v. Piqua Minissing Wood Products Co., (6th cir), 109 Fed. (2d) 552 14
NLRB v. P. Lorillard Co., (6th cir.), 117 Fed. (2d) 921 (reversed on another point 314 U. S. 512, 62 S. Ct. 397, 86 L. Ed. 358) 19, 34
NLRB v. Reed & Prince Mfg. Co., (1st cir.), 118 Fed. (2d) 874 (cert. den. 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549) 16
NLRB v. Remington Rand, Inc., (2d cir.), 94 Fed. (2d) 862 (cert. den. 304 U. S. 576, 58 S. Ct. 1046, 82 L. Ed. 1540) 14, 17, 19
NLRB v. Sands Mfg. Co., 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682 27, 57
NLRB v. Schmidt Baking Co., (4th cir.), 122 Fed. (2d) 162 17, 24
NLRB v. Somerset Shoe Co., (1st cir.), 111 Fed. (2d) 681 16, 24
NLRB v. Sunshine Mining Co., (9th cir.), 110 Fed. (2d) 780 (cert. den. 312 U. S. 678, 61 S. Ct. 447, 86 L. Ed. 1118) 15, 18, 24, 28
NLRB v. Swift & Co., (6th cir.), 127 Fed. (2d) 30 23
NLRB v. Texas Mining & Smelting Co., (5th cir.), 117 Fed. (2d) 86 14
NLRB v. The Blanton Co., (8th cir.), 121 Fed. (2d) 564 18, 19, 25
NLRB v. Virginia Electric & Power Co., (Dec. 22, 1941) 314 U. S. 469, 62 S. Ct. 344, 86 L. Ed. 306 65
NLRB v. Westinghouse Air Brake Co., (3d cir.), 120 Fed. (2d) 1004 23
NLRB v. Whittier Mills Co., (5th cir.), 123 Fed. (2d) 725 17

NLRB v. Whittier Mills Co., (5th cir.), 111 Fed. (2d) 474 17
NLRB v. Union Pacific Stages, (9th cir.), 99 Fed. (2d) 153 40

Oughton v. NLRB, (3d cir.), 118 Fed. (2d) 486 16

P. Lorillard Co., Matter of, 16 NLRB 684 (enf'd NLRB v. P. Lorillard Co., supra) 55
Pueblo Gas & Fuel Co. v. NLRB, (10th cir.), 118 Fed. (2d) 304 16

Rapid Roller Co. v. NLRB, (7th cir.), 126 Fed. (2d) 452 20

Singer Mfg. Co. v. NLRB, (7th cir.), 119 Fed. (2d) 131 (cert. den. 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549) 17, 21, 23, 29
Singer Mfg. Co., Matter of, 24 NLRB p. 444 49
Southern Steamship Co. v. NLRB, (3d cir.), 120 Fed. (2d) 505 (rev'd on another point 314 U. S. 594, 62 S. Ct. 100, 86 L. Ed. 64) 14
Stonewall Cotton Mills, Inc. v. NLRB, (5th cir.), ... Fed. (2d) (June 3, 1942) 22, 24-25
Stewart Die Casting Corp. v. NLRB, (7th cir.), 114 Fed. (2d) 849 (cert. den. 312 U. S. 680, 61 S. Ct. 449, 85 L. Ed. 1119) 15

Texas Co. v. NLRB, (9th cir.), 120 Fed. (2d) 186 65
The Solvay Process Co. v. NLRB, (5th cir.), 117 Fed. (2d) 83 (cert. den. 313 U. S. 596, 61 S. Ct. 1121, 85 L. Ed. 1549) 14

U. S. et al. v. Carolina Freight Carriers Corp., U. S. 62 S. Ct. 722, 86 L. Ed. 622 (Mar. 2, 1942) 66

Valley Mould & Iron Corp. v. NLRB, (7th cir.), 116 Fed. (2d) 760 (cert. den. 313 U. S. 590, 61 S. Ct. 114, 85 L. Ed. 1545) 16

Wilson & Co., Inc. v. NLRB, (8th cir.), 115 Fed. (2d) 759 15, 17, 24, 61, 69

MISCELLANEOUS.

75 Cong. Rec. 9685 (1935) 27
79 Cong. Rec., 1935 pp. 9682 and 9711 32
Cong. Rec. Senate, Vol. 79, No. 101, p. 7852 (May 5, 1935) 26
Cong. Rec., Vol. 79, No. 101, p. 7852 (May 5, 1935).... 31
Cong. Rec., Vol. 79, No. 102, p. 7959 (May 16, 1935) 26, 31
S. 1958, 74th Cong., 1st Sess., Part 2 11
S. Rep. 573, 74th Cong., 1st Sess. (1935) 26, 31
49 Stat. 453, U. S. C. A. Title 29, Sec. 159 13

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For The Ninth Circuit.

No. 10108

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. MONTGOMERY WARD & COMPANY, Respondent.	Upon Petition for Enforcement and Upon Cross-Petition for Review and to Set Aside an Order of the National Labor Relations Board.
MONTGOMERY WARD & COMPANY, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	

BRIEF OF MONTGOMERY WARD & CO., INCORPORATED, UPON ITS PETITION FOR REVIEW AND TO SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

THE PARTIES.

Hereafter in this brief we shall refer to the petitioner and cross-respondent, National Labor Relations Board, as the "Board"; to the respondent and cross-petitioner, Montgomery Ward & Co., Incorporated, an Illinois corporation, as "Wards"; to the Warehousemen's Union, Local 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, as the "Warehousemen"; to the Retail Clerks' Inter-

national Protective Association, Local No. 1257, as the "Clerks"; and to the latter two organizations collectively as the "Unions".

THE TERMS USED.

Hereafter in this brief we shall refer to the National Labor Relations Act (an Act of Congress approved July 5, 1935, c. 372, 49 Stat. 449-457, U. S. C. A., Title 9, Sections 151-166) as "the Act"; and to all forms of the closed shop, whether called "union shop", "union preference shop", or something else, as the "closed shop".

STATEMENT AS TO JURISDICTION.

Upon charges filed December 13 and December 21, 1940, that Wards had violated sections 8 (1) and 8 (5) of the Act (R. 1-6), the Board held hearings from April 14 to April 17, 1941. On November 29, 1941, the Board issued its Decision and Order, holding Wards guilty. This Decision and Order is set out on pages 22-85 of the Record.

On April 6, 1942, the Board filed its petition for enforcement before this Court (R. 86-94). On April 13, 1942, Wards filed a Cross-Petition for review and to set aside the Board's Order (R. 97-99) and also filed its answer to the Board's Petition (R. 95-96). To this Cross-Petition, Wards attached a statement of Points (R. 902-909).

The jurisdiction of this Court to hear the cause thus presented derives from Section 10 (f) of the Act (29 U. S. C. A., Sec. 160).

STATEMENT OF THE CASE.

Wards operates, in Portland, Oregon, a mail order house employing in May, 1940, about 1,200 persons (R. 27, 110) and a retail store employing 175 persons (R. 27, 110). On August 10, 1940, the Board certified the Ware-

housemen as representatives of some 470 employees of the mail order house (R. 120). On August 6, 1940, the Clerks, claiming a majority, requested bargaining privileges (R. 321-2). A question as to the proper unit arising, the Clerks and another union claiming to represent "office workers" agreed on October 2, 1940, to negotiate jointly for "one contract * * * covering the entire retail store" (R. 323). The two unions jointly were recognized by the entrance of Wards into negotiations with them on October 22, 1940 (R. 818-823).

Wards was represented at the ensuing negotiations by W. B. Powell, its West Coast labor representative (R. 34) and by various members of its local management. Powell reported to John A. Barr of Chicago, Wards' "official in charge of labor relations and collective bargaining" (R. 34). Each of the collective bargaining sessions was fully reported in writing by Powell to Barr (Wards' Exhibits 14, 15, 16, 19, 20, 21, 22, 23, and 24). These reports were credited by the Board, which freely quoted from them in its findings. The collective bargaining sessions were held as follows:

1. October 22—Meeting with Clerks and Office Workers at Portland (See Wards' Ex. 24, R. 818-823)
2. November 12—Meeting with Warehousemen at Portland (See Wards' Ex. 19, R. 736-744)
3. November 25—Meeting at Oakland, Cal., with Warehousemen and Clerks (See Wards' Ex. 20, R. 745-747)
4. December 13—Meeting with Warehousemen, Clerks, and Office Workers (See Wards' Ex. 21, R. 748-755)
5. December 14—Meeting with Warehousemen, Clerks, and Office Workers (See Wards' Ex. 22, R. 755-759)
6. December 16—Meeting with Warehousemen, Clerks, and Office Workers (See Wards' Ex. 23, R. 760-771)

The Board found that failure to bargain occurred at all of these meetings (R. 24).

At the November 25th meeting, the union spokesmen presented Wards with an ultimatum to agree to a closed shop throughout the Pacific Coast area (R. 47, 745). Wards did not agree, and on December 4, 1940, its Oakland, California store and house were picketed (R. 48). This was followed by a strike at Portland beginning December 7 (R. 49), which was still existent at the time of the hearings beginning April 14, 1941. The Board found that this strike was "caused and prolonged" by the supposed failure to bargain (R. 69).

On December 8, 1940, Wards instructed its supervisors at Portland to telephone employees that:

> "Since you were not at work today I wanted to let you know that we are operating tomorrow as usual and your job is open for you if you want to come in" (R. 69).

The Board held that these telephone messages were a "solicitation" of employees to return to work in violation of Section 8 (1) of the Act.

One supervisor (McGowan), in the words of the Board, "went beyond these instructions" (R. 70), and made certain remarks to three employees which the Board regards as amounting also to a violation of Section 8 (1).

The only controverted questions of fact were whether McGowan made the statements ascribed to him, and certain minor discrepancies as to what was said at the meeting of November 25th.

SPECIFICATION OF ERRORS RELIED UPON.

(References to the portion of this Brief which argues the specification are indicated in each instance.)

1. The Board erred in failing to find on the undisputed evidence that Wards fulfilled its duty under the Act to bargain collectively. (Propositions I and II.)

2. The Board erred in finding that Wards:

 "has refused to bargain with the Retail Clerks and the Warehousemen as the exclusive representative of its employees in appropriate units with respect to rates of pay, hours of employment, and other conditions of employment" (R. 68-69),

 for the reason that this finding is not supported by substantial evidence. (Propositions II and III.)

3. The Board erred in holding, as a matter of law, that Wards was under the legal duty to promise, in advance of any agreement, to

 "embody understandings that might be reached with the Unions in signed contracts" (R. 58; see also R. 59-60)

 for the reason that the Act does not require an employer formally to promise to do that which the law compels him to do in any event. (Proposition III, division A.)

4. The Board erred in holding, as a matter of law, that Wards was under a legal duty

 "to agree to a clause * * * by which the respondent promised to recognize it (the Union) as exclusive representative" (R. 61)

 although it had already recognized the Unions in fact, since the Act does not require an employer to promise to do that which the law compels him to do in any event. (Proposition III, division A.)

5. The Board erred in holding, as a matter of law, that Wards' offer to include recognition as a "preliminary whereas clause" did not "satisfy respondent's obligation" (R. 61) and that Wards was obliged to "bind itself to give exclusive recognition" (R. 61), since the Act does not require an employer to promise to do that which the law compels him to do in any event. (Proposition III, division A.)

6. The Board erred in interpreting the Act as requiring an employer to do more than to agree to contract on the basis of the *status quo,* and as requiring him to offer concessions to union demands (R. 62-63, 65-66). (Proposition I, division B, subdiv. 1; Proposition III, division C.)

7. The Board erred in holding, as a matter of law, that Wards' "refusal to submit * * * written countersuggestions" to the Union demands evidenced "a want of good faith and, hence, a refusal to bargain" (R. 65), since the Act does not require an employer who has stated his unwillingness to offer more than the *status quo* on given points, and who has answered all requests to explain the *status quo,* to make a formal written "countersuggestion". (Proposition I, division B, subdiv. 2; Proposition III, division 6, subdiv. 3.)

8. The Board erred, as a matter of law, in holding that Wards

> "in thus relying simply on existing practice as a reason for not agreeing to union proposals, failed to fulfill its obligation to discuss freely and fully their [the parties'] respective claims and demands and, when these are opposed, to justify them on reason" (R. 66)

for the reason that the Act does not require an employer to justify its position as to Union demands to the satisfaction of the Board, and the Act does not permit the Board to pass judgment upon the reasonableness of an employer's position. (Proposition I, division B; Proposition III, division C, subdiv. 4, and division F.)

9. The Board erred, as a matter of law, in treating arguments advanced in Wards' brief before the Board as evidence that Wards had previously failed to bargain in good faith (R. 63).

10. The Board erred in holding, as a matter of law, that Wards

> "violated its obligation to deal with the Unions as the exclusive representatives of the employees" (R. 67)

in violation of Section 8 (5) of the Act by its telephone messages to employees telling them that the plant would continue to operate and their jobs be open. (Proposition III, division G.)

11. The Board erred in finding that Wards "demonstrated its refusal to bargain collectively in good faith" (R. 62) because it

> "refused * * * to insert in the contract with the Warehousemen a clause by which the respondent promised not to discriminate because of Union membership" (R. 61)

for the reason that such discrimination, being prohibited by law, was not a proper subject for collective bargaining. (Proposition III, division B, subdiv 4.)

12. The Board erred in finding that

> "the respondent's attitude and conduct with respect to the union's requests for counterproposals evidences a want of good faith" (R. 65)

for the reason that Wards' refusal to submit written counterproposals or to make counterproposals incorporating concessions does not substantially support any inference that Wards was unwilling to contract on a basis acceptable to it. (Proposition III, division D.)

13. The Board erred in finding the evidence that

> "although the respondent had decided as early as November 26 to agree to the Chicago conference, the respondent deliberately postponed conveying this information to the Unions until November 28" (R. 66)

substantially supported an inference that Wards was unwilling to reach an agreement with the Unions on acceptable terms. (Proposition III, subdiv. E.)

14. The Board erred in finding that Powell, Wards' negotiator, engaged in "inconsistent behavior" (R. 66-67) since such finding is not supported by substantial evidence. (Proposition III, division F, subdiv. 1.)

15. The Board erred in inferring "bad faith" from Wards' "repeated rejection of union proposals on the general ground that they were not consonant with company policy or practice" (R. 65-66) for the reason that the insistence of an employer that he will not make concessions by changing present practices does not substantially support such an inference. (Proposition III, division D, subdiv. 4.)

16. Even if the record contained some substantial support for a finding that Wards failed to bargain collectively, the Board erred in appraising the evidence under all or any of the mistaken views of the law covered in the specifications numbered 3, 4, 5, 6, 7, 8, 9 and 10 above. (Proposition IV.)

17. The Board erred in finding:

> "that the respondent's refusals to bargain caused and prolonged the strike at Portland, which began on December 7, 1940" (R. 69)

for the reason that the finding is not supported by substantial evidence.

18. The Board erred in finding that Wards

> "by stating to the employees that 'we are operating tomorrow as usual and your job is open for you if you want to come in' was seeking to induce the striking employees to desert the Unions and to abandon their concerted activity" (R. 74)

and in holding that, by "such solicitation", Wards "interfered, restrained and coerced its employees" (R. 74) in violation of Section 8 (1) of the Act. (Proposition V.)

19. The Board erred in finding that Wards

> "is clearly responsible for McGowan's coercive statements to Blackburn, Fullerton and Hough" (R. 73)

for the reason that such finding is not supported by substantial evidence. (Proposition V.)

SUMMARY OF ARGUMENT.

We propose to show:

first, that the *undisputed facts* show that Wards bargained collectively in full compliance with the Act;

second, that the record is devoid of any evidence which, under a proper interpretation of the Act, would substantially support any finding that Wards failed to bargain collectively.

third, even if an intensive examination of the record might bring to light some dubious item of evidence sufficient to support a finding of failure to bargain, the Board's actual findings were made under a misconception of the Act and of the legal effect of certian of Wards' positions. A finding so made can no more be permitted to stand than a jury verdict, even though based on substantial evidence, when the instructions are erroneous.

fourth, no substantial evidence supports the finding that Wards was responsible for any actions amounting to interference with the exercise of rights guaranteed by the Act.

The main issue is whether Wards bargained collectively. The first three points outlined above all involve the proper definition of the duty to bargain. The first proposition to be advanced in this brief sets forth an analysis of the character and the extent of this duty. The next four propositions parallel the four points listed above.

ARGUMENT.

I.

The Order to Bargain Collectively Must Be Set Aside Unless Supported By Evidence of Conduct Which Constituted Either a Refusal to Recognize the Authority of the Union, Or a Refusal to Discuss Union Demands Sufficiently to Avoid Mutual Misunderstanding, Or a Refusal to Make Binding and Written Agreements on Such Terms, If Any, As Were Mutually Acceptable.

(Arguing Specifications of Error 1, 6, 7, and 8).

The National Labor Relations Act was drawn in the belief that if employees are given the right to organize, and this right is protected against employer interference, the organized employees, by their ability to employ economic weapons such as a strike, will persuade their employers to enter into binding trade agreements. Hence economic strife will tend to lessen. This was the basis on which the inclusion in the Act of the duty to bargain collectively was urged upon Congress by Lloyd K. Garrison, chairman of one of the two prior Labor Boards:

> "I think while in many cases where you jam together an employer and a union and you say, 'You have got to sit down and you have got to talk' in many cases nothing will happen. They won't agree, cannot agree; you are going to have a strike and so on. But in many cases they will. And the mere process of saying to that employer, 'You have got to sit down and talk' is a salutary thing because in a great many cases it will result to his surprise as well as everybody else in an agreement being arrived at."
>
> (Senate hearings on S. 1958, 74th Cong., 1st Sess., Part 2)

Recognizing this as the legislative belief, the United States Supreme Court has said:

> "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act itself does not attempt to compel."
>
> *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, at p. 45, 57 S. Ct. 615, 81 L. Ed. 893

These considerations almost automatically define the extent of the duty to bargain collectively:

> "The Act * * * meant to give to the employees whatever advantage they would get from collective pressure upon their employer; and the question here is what are the fair implications of that grant."
>
> *Art Metals Constr. Co.* v. *NLRB,* (2d cir.), 110 Fed. (2d) 148, at p. 150

Because the duty to bargain was imposed in order to make trade agreements possible, a "fair implication" is that the duty to bargain is the duty to do that which is necessary before trade agreements on any basis are possible. The duty to bargain collectively can therefore be stated in the terms of those necessities:

A. The duty to bargain collectively is no less nor more than the duty to recognize the authority of the employee representative, to participate in such discussion as is necessary to avoid mutual misunderstanding, and to enter into binding and written agreements on such terms, if any, as are mutually acceptable.

These steps, without more, will make the attainment of a binding trade agreement possible. They will not always be enough to insure that agreement *will* result; but they are enough to insure that mutually satisfactory terms will be discovered *if they exist* and will be embodied in a contract.

The duty to bargain is no more nor less than the duty to take these necessary steps.

The following analysis of *all* of the court decisions upholding findings by the Board of failure to bargain shows that *in every instance* the finding was supported by evidence of failure to do what the definition here advanced requires the employer to do.

1. **The employer must recognize the exclusive authority of the chosen representatives of his employees in an appropriate unit to speak and contract on behalf of all the employees in the unit.**

The legislative hope that binding trade agreements will result from the procedure of collective bargaining would be frustrated by a refusal to recognize the authority of employee spokesmen. For that reason the duty to barbain is expressly made "subject to the provisions of Section 9 (a)" which provides that the choice of the majority in a proper unit is "the exclusive representative of all the employees in such unit" (49 Stat. 453, U. S. C. A. Title 29, Sec. 159).

The duty to "recognize" the union as the "exclusive representative" of all employees in the unit is thus an integral part of the duty to bargain.

A refusal to "recognize" the union may be an express one. On the other hand, it may be evidenced by conduct clearly inconsistent with such recognition, such as attempts to make individual agreements with employees covering subjects contemporaneously being negotiated with the representatives of those employees, the taking of unilateral action as to matters being negotiated without advising the bargaining agency, and attempts during negotiations to weaken the authority of the union.

For these reasons, the Courts have sustained findings of failure to bargain when supported by evidence of:

(a) An out-and-out refusal to grant recognition to a majority union:

NLRB v. *Moltrup Steel Products Co.,* (3d cir.), 121 Fed. (2d) 612; *NLRB* v. *Louisville Refining Co.,* (6th cir.), 102 Fed. (2d) 678 (cert. den. 308 U. S. 568, 60 S. Ct. 81, 84 L. Ed. 477); *NLRB* v. *Piqua Minissing Wood Products Co.,* (6th cir.), 109 Fed. (2d) 552; *M. H. Ritzwoller Co.* v. *NLRB,* (7th cir.), 114 Fed. (2d) 432, at p. 436; *NLRB* v. *Bachelder,* (7th cir.), 120 Fed. (2d) 574, at p. 577 (cert. den. 314 U. S. 647, 62 S. Ct. 90, 86 L. Ed. 79);

(b) A refusal to accept reasonable proof of majority status, or a refusal to accept a reasonable procedure to ascertain the facts:

NLRB v. *Remington Rand, Inc.,* (2d cir.), 94 Fed. (2d) 862 (cert. den. 304 U. S. 576, 58 S. Ct. 1046, 82 L. Ed. 1540); *NLRB* v. *Dahlstrom Metallic Door Co.,* (2d cir.), 112 Fed. (2d) 756; *NLRB* v. *Federbush Co., Inc.,* (2d cir.), 121 Fed. (2d) 954; *NLRB* v. *National Seal Corp.,* (2d cir.), 127 Fed. (2d) 776, at p. 778; *NLRB* v. *New Era Die Co., Inc.,* (2d cir.), 118 Fed. (2d) 500; *The Solvay Process Co.* v. *NLRB,* (5th cir.), 117 Fed. (2d) 83 (cert. den. 313 U. S. 596, 61 S. Ct. 1121, 85 L. Ed. 1549); *NLRB* v. *Texas Mining & Smelting Co.,* (5th cir.), 117 Fed. (2d) 86

(c) A refusal to grant recognition in the mistaken belief that certification was erroneous:

Southern Steamship Co. v. *NLRB,* (3d cir.), 120 Fed. (2d) 505 (rev'd on another point 314 U. S. 594, 62 S. Ct. 100, 86 L. Ed. 64); *NLRB* v. *Lane Cotton Mills Co.,* (5th cir.), 111 Fed. (2d) 814

(appeal dismissed 310 U. S. 723, 61 S. Ct. 316, 85 L. Ed. 471); *NLRB* v. *Calumet Steel Div. of Borg-Warner,* (7th cir.), 121 Fed. (2d) 366, at pp. 368, 370

(d) A refusal to recognize a majority union as a representative of employees other than its own members:

National Licorice Co. v. *NLRB,* 309 U. S. 350, at p. 358, 60 S. Ct. 569, 84 L. Ed. 799

NLRB v. *Sunshine Mining Co.,* (9th cir.), 110 Fed. (2d) 780, at pp. 786-7, (cert. den. 312 U. S. 678, 61 S. Ct. 447, 86 L. Ed. 1118) ("a declaration of policy * * * emphasizing that respondent would 'bargain collectively * * * only to the extent of their membership'.") *Bethlehem Shipbuilding Corp., Ltd.* v. *NLRB,* (1st cir.), 114 Fed. (2d) 930 (appeal dismissed 312 U. S. 710, 61 S. Ct. 448, 85 L. Ed. 1141); *NLRB* v. *Moench Tanning* Co., (2d cir.), 121 Fed. (2d) 951; *Hartsell Mills Co.* v. *NLRB,* (4th cir.), 111 Fed. (2d) 291; *NLRB* v. *Boss Mfg. Co.,* (7th cir.), 107 Fed. (2d) 574, at p. 577; *Stewart Die Casting Corp.* v. *NLRB,* (7th cir.), 114 Fed. (2d) 849, at p. 853, (cert. den., 312 U. S. 680, 61 S. Ct. 449, 85 L. Ed. 1119); *McQuay-Norris Mfg. Co.* v. *NLRB,* (7th cir.), 116 Fed. (2d) 748, at pp. 750, 751 (cert. den., 313 U. S. 565, 61 S. Ct. 843, 85 L. Ed. 1524); *NLRB* v. *Calumet Steel Division of Borg-Warner Corp.,* (7th cir.), 121 Fed. (2d) 366, at p. 370; *Wilson & Co., Inc.* v. *NLRB,* (8th cir.), 115 Fed. (2d) 759; *Continental Oil Co.* v. *NLRB,* (10th cir.), 113 Fed. (2d) 473 (cert. granted on another point, 311 U. S. 637, 61 S. Ct. 72, 85 L. Ed. 406)

(e) A refusal to recognize a labor organization, as such, as the bargaining agent:

NLRB v. *Griswold Mfg. Co.,* (3d cir.), 106 Fed. (2d) 713 (See, for the facts referred to by the Court, 6 NLRB at p. 308); *Pueblo Gas & Fuel Co.* v. *NLRB,* (10th cir.), 118 Fed. (2d) 304

(f) A refusal to grant or to continue recognition in the mistaken belief that a majority union has lost its right to represent employees because of a strike or other reason:

NLRB v. *Somerset Shoe Co.,* (1st cir.), 111 Fed. (2d) 681; *NLRB* v. *Reed & Prince Mfg. Co.,* (1st cir.), 118 Fed. (2d) 874 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549); *NLRB* v. *Highland Shoe, Inc.,* (1st cir.), 119 Fed. (2d) 218; *Black Diamond Steamship Corp.* v. *NLRB,* (2d cir.), 94 Fed. (2d) 875 (cert. den., 304 U. S. 579, 58 S. Ct. 1044, 82 L. Ed. 1542); *NLRB* v. *American Mfg. Co.,* (2d cir.), 106 Fed. (2d) 61 (affirmed but modified, 309 U. S. 629, 60 S. Ct. 612, 84 L. Ed. 988); *NLRB* v. *George P. Pilling & Son Co.,* (3d cir.), 119 Fed. (2d) 32; *Oughton* v. *NLRB,* (3rd cir.), 118 Fed. (2d) 486; *NLRB* v. *Chicago Apparatus Co.,* (7th cir.), 116 Fed. (2d) 753, at p. 758; *Valley Mould & Iron Corp.* v. *NLRB,* (7th cir.), 116 Fed. (2d) 760, at p. 764 (cert. den., 313 U. S. 590, 61 S. Ct. 1114, 85 L. Ed. 1545)

(g) The negotiation or attempted negotiation of individual contracts with employees on terms inconsistent with the demands presented by the bargaining agent:

NLRB v. *Reed & Prince Mfg. Co.,* (1st. cir.), 118 Fed. (2d) 874 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549); *NLRB* v. *Highland Shoe Inc.,* (1st cir.), 119 Fed. (2d) 218; *NLRB* v. *Hopwood Retinning Co.,* (2d cir.), 98 Fed. (2d) 97;

NLRB v. *American Mfg. Co.,* (2d cir.), 106 Fed. (2d) 61 (affirmed but modified, 309 U. S. 629, 60 S. Ct. 612, 84 L. Ed. 988); *NLRB* v. *Lightner Publishing Corp. of Illinois,* (7th cir.), 113 Fed. (2d) 621, at p. 625; *Stewart Die Casting Corp.* v. *NLRB,* (7th cir.), 114 Fed. (2d) 849, at p. 853 (cert. den., 312 U. S. 680, 61 S. Ct. 449, 85 L. Ed. 1119)

(h) The making of general and unilateral changes in wages or working conditions contemporaneously with bargaining negotiations without notice to or discussion with the bargaining agent ("presentation of a *fait accompli*"):

NLRB v. *George P. Pilling & Son Co.,* (3rd cir.), 119 Fed. (2d) 32; *Great Southern Trucking Co.* v. *NLRB,* (4th cir.), 127 Fed. (2d) 180, at p. 186; *NLRB* v. *Whittier Mills Co.,* (5th cir.), 111 Fed. (2d) 474; *NLRB* v. *Gerity Whitaker Co.,* (6th cir.), ... Fed. (2d), June 1, 1942 (*Per curiam* opinion; facts set forth in 33 NLRB, No. 78); *Inland Lime & Stone Co.* v. *NLRB,* (7th cir.), 119 Fed. (2d) 20, at p. 22; *Singer Mfg. Co.* v. *NLRB,* (7th cir.), 119 Fed. (2d) 131, at pp. 136, 137 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549); *Wilson & Co. Inc.* v. *NLRB,* (8th cir.), 115 Fed. (2d) 759.

(i) Attempting while negotiations are in progress to induce employees to leave the union, either by direct solicitation or by disparagement of the union:

NLRB v. *Biles Coleman Lumber Co.,* (9th cir.), 98 Fed. (2d) 18, at p. 22 (Telling employees direct that union demands "impossible" and workers "better off if they paid no heed to outside organizers"); *NLRB* v. *Remington Rand, Inc.,* (2d cir.), 94 Fed. (2d) 862 (cert. den., 304 U. S. 576, 58 S. Ct. 1046, 82 L. Ed. 1540) (Taking of strike vote by employer to disprove union strike vote); *NLRB* v. *Acme Air Appliance Co., Inc.,* (2d cir.), 117 Fed.

(2d) 417 (Telling employees any contract would be with them and not with union); *NLRB* v. *New Era Die Co., Inc.,* (3d cir.), 118 Fed. (2d) 500 (Polling employees on closed shop issue immediately after request for bargaining); *NLRB* v. *Schmidt Baking Co.,* (4th cir.), 122 Fed. (2d) 162 (Telling employees employer would give them what union was asking on their behalf); *Great Southern Trucking Co.* v. *NLRB,* (4th cir.), 127 Fed. (2d) 180, at p. 186 (A "continued campaign during the period of the negotiations to induce withdrawals from the Union"); *NLRB* v. *The Blanton Co.,* (8th cir.), 121 Fed. (2d) 564 (Calling employees' meeting to make "final declaration" of policy); *Colorado Fuel & Iron Corp.* v. *NLRB,* (10th cir.), 121 Fed. (2d) 165, at p. 175.

(j) A refusal to negotiate in the mistaken belief that the Act did not cover the employer's business:

NLRB v. *Fainblatt,* 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014

NLRB v. *Sunshine Mining Co.,* (9th cir.), 110 Fed. (2d) 780 (cert. den., 312 U. S. 678, 61 S. Ct. 447, 85 L. Ed. 1118)

(k) The making of a closed shop contract with a minority union at the time a majority union requests bargaining rights:

NLRB v. *National Motor Bearing Co.,* (9th cir.), 105 Fed. (2d) 652

(l) Delaying recognition while using "the time thus gained to coerce and intimidate enough of the members to withdraw from the union to deprive it of its majority":

NLRB v. *Dixie Motor Coach Corp.,* (5th cir.), ... Fed. (2d), at p. (May 27, 1942)

2. The employer must accord the representatives of his employees opportunity to present demands, to support them with discussion, and to learn the employer's position with respect to them.

Agreement between employer and employees on mutually acceptable terms is impossible so long as the terms on which the parties will insist are unrevealed. Each party must be given an opportunity to learn the terms on which the other party insists.

Consequently, the employer must make authorized spokesmen available at convenient places to participate in oral discussion of demands for so long as the possibilities of agreement have not been fully explored, and these spokesmen must reveal the employer's position as to employee demands, even if that position be no more than a refusal to agree to such demands.

Hence the courts have sustained findings of failure to bargain because of evidence of:

(a) A refusal to meet and to negotiate otherwise than through an exchange of letters: *NLRB* v. *P. Lorillard Co.,* (6th cir.), 117 Fed. (2d) 921 (reversed on another point, 314 U. S. 512, 62 S. Ct. 397, 86 L. Ed. 358)

(b) A failure to answer a request to meet for collective bargaining purposes and a failure to empower management representatives to negotiate: *Agwilines, Inc.* v. *NLRB,* (5th cir.), 87 Fed. (2d) 146 (See 2 NLRB 1, at pp. 15 and 16)

(c) A refusal to meet or to deal with authorized representatives: *NLRB* v. *Remington Rand, Inc.,* (2d cir.), 94 Fed. (2) 862 (cert. den. 304 U. S. 576, 58 S. Ct. 1046, 82 L. Ed. 1540); *NLRB* v. *The Blanton Co.,* (8th cir.), 121 Fed. (2d) 564

(d) A rejection of demands without explanation or discussion:

NLRB v. *George P. Pilling & Son Co.,* (3d cir.), 119 Fed. (2d) 32; *NLRB* v. *National Seal Corp.,* (2d) cir.), 127 Fed. 776, at pp. 777 and 779; *NLRB* v. *Express Publishing Co.,* (5th cir.), 111 Fed. (2d) 588, mod'f'd 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930 (For the facts in detail, see 13 NLRB at p. 1213); *Inland Lime & Stone Co.* v. *NLRB,* (7th cir.), 119 Fed. (2d) 20, at p. 22

(e) A statement by an employer, after previously avoiding meetings, and after receiving a copy of union demands, that "he had nothing to discuss at this time": *M. H. Ritzwoller Co.* v. *NLRB,* (7th cir.), 114 Fed. (2d) 432, at p. 436

(f) A refusal "to negotiate or discuss with the union questions involving the conditions of employment and the interpretation of the contract under which the parties were working": *Rapid Roller Co.* v. *NLRB,* (7th cir.), 126 Fed. (2d) 452, at p. 459

(g) A statement by an employer, in refusing to agree to negotiate if proof of majority offered, that "he was opposed to a meeting with the Guild": *NLRB* v. *Clarksburg Pub'g Co.,* (4th cir.), 120 Fed. (2d) 976

(h) A statement by an employer that he would "not discuss the scheduling of new rates except after they were put into effect": *NLRB* v. *Boss Mfg. Co.,* (7th cir.), 118 Fed. (2d) 187, at p. 189

(i) A refusal to continue negotiations unless charges of unfair labor practices were withdrawn: *Hartsell Mills Co.* v. *NLRB,* (4th cir.), 111 Fed. (2d) 291

(j) A refusal to continue negotiations in the mistaken belief that an impasse has been reached: *Jeffery-DeWitt Insulator Co.* v. *NLRB,* (4th cir.), 91 Fed. (2d) 134 (cert. den. 302 U. S. 731, 58 S. Ct. 55)

(k) A refusal to discuss, or to negotiate regarding, the settlement of past grievances: *NLRB* v. *Bachelder,* (7th cir.), 120 Fed. (2d) 574, at p. 577 (cert. den. 314 U. S. 647, 62 S. Ct. 90, 86 L. Ed. 79)

(l) A refusal to show what existing practices as to seniority were: *Singer Mfg. Co.* v. *NLRB,* (7th cir.), 119 Fed. (2d) 131 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549)

(m) A refusal to negotiate further after a strike has been called: *National Licorice Co.* v. *NLRB,* 309 U. S. 350, at p. 358, 60 S. Ct. 569, at p. 574, 84 L. Ed. 799

3. The employer must agree to demands which are, in fact, acceptable, and must, if requested, embody mutually acceptable points in a binding, written trade agreement.

Prior to the Act, the employer had the right to fix the terms of employment unilaterally, and to change them as he saw fit. These terms constituted, in effect, individual contracts of employment with each employee. The Act makes these terms the subject of collective, rather than individual, agreement if the employees desire to bargain collectively. *The employer may still unilaterally decide the terms upon which he will insist;* but he must be willing upon demand to embody those terms in a written and signed contract.

In the absence of a contrary showing, the Board or Courts may assume that the terms presently in effect are the acceptable terms which the employer proposes to con-

tinue. Hence such terms must be embodied in a contract on demand:

> "The bargaining agent * * * demanding no more as to wages, hours, and other conditions than what the employer has already granted and proposes to grant, the parties to the bargaining conference are in agreement."
>
> *NLRB* v. *Knoxville Pub'g Co.,* (6th cir.), 124 Fed. (2d) 875, at p. 883

Other terms, which are in fact acceptable, must also be included.

Since a statement in advance of negotiations of an intent not to do what the law requires has the immediate effect of discouraging negotiations, such statements may in themselves constitute a refusal to bargain.

For these reasons a finding of failure to bargain collectively is supported by evidence of:

(a) A refusal to agree to demands which were in fact acceptable:

NLRB v. *Highland Park Mfg. Co.,* (4th cir.), 110 Fed. (2d) 632 (Employer refused "to make even an oral agreement regarding matters as to which there was no real disagreement")

Globe Cotton Mills v. *NLRB,* (5th cir.), 103 Fed. (2d) 91 (See 6 NLRB at p. 466: employer rejected proposals "admitedly unobjectionable," saying it "could see no reason for an agreement")

Stonewall Cotton Mills, Inc. v. *NLRB,* (5th cir.), ... Fed. (2d) (June 3, 1942) (For facts, see 36 NLRB 240, at p. 263; employer refused to agree to maintain present wage scale even for 30 days)

NLRB v. *Knoxville Publishing Co.,* (6th cir.), 124 Fed. (2d) 875 (Refusal to contract as to working conditions employer proposed to continue)

NLRB v. *Swift and Co.,* (6th cir.), 127 Fed. (2d) 30, at p. 31 (Employer objected to "clauses which would embody existing company policy" and refused "even to bind itself for a single day to continue the existing forty-hour week")

Inland Lime & Stone Co. v. *NLRB,* (7th cir.), 119 Fed. (2d) 20, at p. 22 (Rejection of contract *in toto* after expressing agreement "on several points")

Singer Mfg. Co. v. *NLRB,* (7th cir.), 119 Fed. (2d) 131, at p. 136, cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549 ("Petitioner was unwilling to contract with the United to do that which it had been in the habit of doing before United came into the shop")

(b) A refusal to make any binding commitments with respect to wages and basic working conditions:

NLRB v. *Westinghouse Air Brake Co.,* (3d cir.), 120 Fed. (2d) 1004 (Wages and other working conditions "subject alone to the will of the company")

NLRB v. *Swift and Co.,* (6th cir.), 127 Fed. (2d) 30, at p. 31 (Employer "would not agree to bind itself to anything relating to wages and hours")

NLRB v. *Boss Mfg. Co.,* (7th cir.), 118 Fed. (2d) 187, at p. 189 ("As to matters covering wages, rates of pay, and working conditions, respondent stated it would not agree to them as these would interfere with management")

Singer Mfg. Co. v. *NLRB,* (7th cir.), 119 Fed. (2d) 131, at p. 136 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549) (The employer "insisted that the contract should provide that it might change its practice 'whenever in its opinion such action seemed necessary' and re-

fused a proposal that the agreement should provide for continuation of existing practice and modification thereof by either collective bargaining or arbitration")

(c) An announcement in advance of negotiations that the employer would never operate under a contract:
NLRB v. *Somerset Shoe Co.,* (1st cir.), 111 Fed. (2d) 681

(d) A refusal, after agreement is reached, to incorporate such agreement in a written, signed contract:
H. J. Heinz Co. v. *NLRB,* 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309; *Bethlehem Shipbuilding Corp., Ltd.* v. *NLRB,* (1st cir.), 114 Fed. (2d) 930, at p. 941 (cert. den. 312 U. S. 710, 61 S. Ct. 448, 85 L. Ed. 1141); *NLRB* v. *Moench Tanning Co., Inc.,* (2d cir.), 121 Fed. (2d) 951; *NLRB* v. *Highland Park Mfg. Co.,* (4th cir.), 110 Fed. (2d) 632; *Ft. Wayne Corrugated Paper Co.* v. *NLRB,* (7th cir.), 111 Fed. (2d) 869; *Wilson & Co., Inc.* v. *NLRB,* (8th cir.), 115 Fed. (2d) 759; *Continental Oil Co.* v. *NLRB,* (10th cir.), 113 Fed. (2d) 473, at p. 481 (cert. granted on another point, 311 U. S. 861, 61 S. Ct. 72, 85 L. Ed. 406).

(e) An announcement, in advance of negotiations, that the employer would not sign a contract:
NLRB v. *Sunshine Mining Co.,* (9th cir.), 110 Fed. (2d) 780 (cert. den. 312 U. S. 678, 61 S. Ct. 447, 85 L. Ed. 1118); *NLRB* v. *Hopwood Retinning Co.,* (2d cir.), 98 Fed. (2d) 97; *Art Metals Constr. Co.* v. *NLRB,* (2d cir.), 110 Fed. (2d) 148; *NLRB* v. *National Seal Corp.,* (2d cir.), 127 Fed. (2d) 776, at p. 779; *Hartsell Mills Co.* v. *NLRB,* (4th cir.), 111 Fed. (2d) 291; *NLRB* v. *Schmidt Baking Co.,* (4th cir.), 122 Fed. (2d) 162; *Stonewall Cotton Mills, Inc.* v. *NLRB,* (5th cir.), ... Fed. (2d)

(June 3, 1942) (for the facts, see 36 NLRB 240, at p. 259); *NLRB* v. *Louisville Refining Co.,* (6th cir.), 102 Fed. (2d) 678 (cert. den. 308 U. S. 568, 60 S. Ct. 81, 84 L. Ed. 477); *NLRB* v. *Boss Mfg. Co.,* (7th cir.), 118 Fed. (2d) 187, at p. 189; *NLRB* v. *Calumet Steel Division of Borg-Warner Corp.,* (7th cir.), 121 Fed. (2d) 366, at p. 370; *NLRB* v. *The Blanton Co.,* (8th cir.), 121 Fed. (2d) 564.

Every decision upholding a finding of failure to bargain has been supported by evidence of conduct which falls into one or more of the three categories outlined above. Sound reasons, backed by ample authority, show why the duty cannot be broadened. The three obligations of the employer, (1) to recognize the exclusive authority of the union, (2) to discuss terms and reveal positions, and (3) to agree to demands or terms which are in fact acceptable, thus comprise the duty to bargain as so far enforced by the Courts.

Failure to observe any one of these three obligations would make the attainment of a binding trade agreement as contemplated by the Act absolutely impossible. No other conduct would necessarily prevent agreement, and no other conduct is consequently proscribed.

B. The duty to bargain collectively leaves the employer with full liberty to decide the terms upon which he will agree.

(Arguing Specification of Error 8)

1. The duty to bargain collectively does not compel an employer to make concessions or changes in the status quo in answer to the demands of employees.

(Arguing Specification of Error 6)

The report of the Senate Committee upon the proposed act stated:

"* * * The essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory."

S. Rep. 573, 74th Cong., 1st Sess. (1935), p. 12

During the debates, Senator Wagner himself said:

"It does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met."

Cong. Rec.—Senate, Vol. 79, No. 101, p. 7852 (May 5, 1935)

Naturally, then, the courts have interpreted the Act to give effect to the Congressional intent:

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever."

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, at p. 45, 57 S. Ct. 615, 81 L. Ed. 893

By necessary logic, if the duty to bargain does not compel the making of agreements on a basis which is not satisfactory to the employer, it does not compel the making of concessions from the *status quo*. During the Senate debates, Senator Walsh said of the bill:

"It anticipates that the employer will deal reasonably with the employees, that he will be patient, but he is obliged to sign no agreements; he can say, 'Gentlemen, we have heard you and considered your proposals. We cannot comply with your request', and that ends it."

Cong. Rec.—Senate, Vol. 79, No. 102, p. 7959 (May 16, 1935)

Mr. Connery, Chairman of the House Committee reporting the bill, similarly explained the duty to bargain:

"The gentlemen may say: 'I will not give you the 10 cents an hour increase you ask'. There is nothing you can do then. Nobody asks that you be made to

> give them 10 cents an hour. This bill just compels you to deal with the men collectively. You must sit across the table and talk things over with them."
>
> 75 Cong. Rec. 9685 (1935)

Consistent with the Congressional intent evidenced by these passages, the Courts have explicitly held that changes in the *status quo* are not compelled.

In *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, at p. 45, 57 S. Ct. 615, 81 L. Ed. 893, the Supreme Court remarked that the Act compels neither agreements nor "adjustments"

In *NLRB* v. *Sands Mfg. Co.,* 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682, the Supreme Court held that the employer was under a duty to bargain respecting the true interpretations of an existing contract. Nevertheless, when the employer "desired to operate its machine shop in accordance with its honest understanding of the contract" and "stated its views to the committee" of its employees, it did not fail to bargain, despite the Board's finding that "it was inconceivable that the employees would have accepted the company's construction of the contract" and that the employer

> "realized that it had no alternative but to operate the plant in the way the men dictated, * * * or keep it closed entirely, or have a strike."

The *Sands* case thus holds that an employer, even though he knows a strike will result, does not fail to bargain collectively when he "stands pat" on his interpretation of an existing contract, or, in other words, when he refuses to grant a concession from what he believes to be the *status quo.*

The Circuit Courts have been equally explicit:

> "The freedom reserved to the employer is freedom to refuse concessions in working conditions to his employees, and to exact concessions from them. * * * "
>
> *Art Metals Constr. Co.* v. *NLRB,* (2d cir.), 110 Fed. (2d) 148, at p. 150

This language was not only quoted with approval in *NLRB* v. *Highland Park Mfg. Co.,* (4th cir.), 110 Fed. (2d) 632, at p. 639, but was quoted by this Court as stating the correct rule in *NLRB* v. *Sunshine Mining Co.,* (9th cir.), 110 Fed. (2d) 780, at p. 788 (cert. den. 312 U. S. 678, 61 S. Ct. 447, 85 L. Ed. 1118). Other holdings to the same effect are these:

> "A formal counterproposal to embody in a contract the Mills' then established wages and hours (with its outstanding promise as to shorter hours), and its established policy as to child labor, and seniority subject to circumstances, would have put beyond question the Mills' willingness to comply with the Act."
>
> *Globe Cotton Mills* v. *NLRB,* (5th cir.), 103 Fed. (2d) 91, at p. 94

> "It (the employer) was required to meet its employees with an open mind, and, if it was unwilling to do more than maintain its present status, to say so, and to express a willingness to have that as the agreement between them."
>
> *NLRB* v. *Express Publishing Co.,* (5th cir.), 111 Fed. (2d) 588, at p. 589 (mod'f'd, but without comment on this point, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930)

> " * * * The questioned contract falls into two general classifications; one, the provisions requiring the respondent to agree to wages, hours, and other conditions of employment, which did not exist at the time these procedures were instituted, nor exist at the present time. Over these the decree and the statute have no control."
>
> *NLRB* v. *Knoxville Pub'g Co.,* (6th cir.), (Jan. 16, 1942), 124 Fed. (2d) 875, at p. 882

"Petitioner could not be compelled to enter into a contract which did not reduce wages or which bound it not to make a reduction in the future."

Singer Mfg. Co. v. *NLRB,* (7th cir.), 119 Fed. (2d) 131, at p. 137 (cert. den., 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549)

If the duty to bargain does not compel an employer to make concessions, a finding of failure to bargain collectively cannot be supported by evidence of a refusal or failure to make concessions. An order to bargain supported only by evidence of a failure to make concessions is nothing more nor less than an order to make concessions. This the law does not permit.

2. The duty to bargain collectively does not compel an employer to make any formal counterproposals to union demands so long as, by explanation of his position in answer to union demands or otherwise, he makes known the terms on which he will insist.

(Arguing Specification of Error 7)

Some of the decisions refer to the making of "counterproposals". The word "counterproposal" may mean different things to different people: (a) counter-demand; (b) an offer of a compromise or concession; or, (c) simply an exposition of the terms on which the bargainer will insist.

Since the Act does not require the making of concessions, an employer is not required to make counter-proposals which are concessionary in character. Likewise, the Act does not require an employer to make counter-demands upon his employees. However, the Act does require an employer to explain his position. In this last sense, and in this sense alone, the Act may be said to compel "counterproposals".

If, therefore, an employer makes known the terms on which he will insist, he has made known his "counter-proposal". The law, of course, does not care whether the employer so labels his statements of position; the law is concerned only with the substance of what he does. The law is concerned solely with the avoidance of misunderstanding, and that is fully avoided if the employer communicates his terms.

Nor is the law concerned with the form or manner in which the terms are communicated:

> "Of course, respondent was not bound to make any agreement, and technically it was not bound to make a counter proposal. * * * "
>
> *NLRB* v. *Express Pub'g Co.,* (5th cir.), 111 Fed. (2d) 588, at p. 589, (mod'f'd on another point, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930)

An employer may even verbally deny that he has a "proposal" to make:

> "In response to the question whether Mr. Lightner made any proposal for ending the difficulty * * * the witness replied, 'He made no definite proposal at all' * * * We are of the opinion that there is no substantial evidence to support a finding that respondent had refused to bargain collectively * * * prior to the meeting of October 7. * * * "
>
> *NLRB* v. *Lightner Pub'g Corp.,* (7th cir.), 113 Fed. (2d) 621, at p. 625

Mr. Justice Wilbur expressed the same thought in his dissenting opinion in *NLRB* v. *Carlisle Lumber Co.,* (9th cir.), 94 Fed. (2d) 138 (cert. den., 304 U. S. 575, 58 S. Ct. 1045, 82 L. Ed. 1539), in discussing an issue not involved in the majority opinion:

> "The law does not purport to require that the collective bargaining shall result in an agreement. It does require and seeks to establish the right of the employees to bargain through their chosen representatives, and *if an agreement is arrived at,* to 'make a

collective agreement'. When the employer has met these representatives and listened to their proposition, the employer is not required to make counter proposals. A refusal to make such proposals or to accept the proposed agreement is clearly the constitutional right of the employer. * * * if made as a result of or after meeting the representatives of the employees." (pp. 150-151. Italics added.)

Both logic and precedent lead to the same conclusion. When the union demands a wage increase, and the employer says "no", his failure to offer a compromise supports the presumption that he proposes to continue the existing wage rates. Presuming, also, as the law does, that the employer intends to obey the law, he has by clear inference stated the terms on which he will insist and has made his "counterproposals". He is under a duty to explain what the *status quo* is, but he is not compelled to offer more, and he is presumed to offer that.

3. The duty to bargain collectively does not imply a power in the Board or the Courts to pass judgment on the reasonableness of the terms which the employer is willing to accept.

The Senate Committee report said explicitly:

"The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or *to permit governmental supervision of their terms*".

S. Rep. 573, 74th Cong., 1st Sess. (1935), p. 12. (Italics added)

Senator Wagner said the same thing: Cong. Rec., Vol. 79, No. 101, p. 7852 (May 5, 1935). Senator Walsh, supporting the bill during debate, said:

"*The bill does not go beyond the office door.* It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and

solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded. * * *

"*What happens behind those doors is not inquired* into and the bill does not seek to inquire into it."

Cong. Rec., Vol. 79, No. 102, p. 7959 (May 16, (1935) (Italics added)

The debates in the House evidence a similar intent. (*Cf.* the remarks of Representatives Griswold aand Walsh, 79 Cong. Rec., 1935, pp. 9682 and 9711.)

The Courts have interpreted the Act in accordance with the Congressional intent so evidenced. Upon charges of violating an order to bargain collectively, the Fifth and Sixth Circuit Courts of Appeals have said:

"The respondents did not ask a single thing of the union that it could not, if it wanted to, have agreed to. The same thing is true of the demands of the union made upon the respondents. *It is not for us to determine whether the proposals of the union or those of the respondents would have been best for employer and employee.*"

NLRB v. *Whittier Mills Co.,* (5th cir.), 123 Fed. (2d) 725, at p. 728 (Italics added)

"Neither the statute nor the present decree require respondent to make a collective contract hiring individuals on any terms other than it may by unilateral action determine. * * * "

NLRB v. *Knoxville Pub'g Co.,* (6th cir.), 124 Fed. (2d) 875, at p. 883

"To sustain this petition and issue a contempt order under this record could mean only one thing, in effect, that the respondents were found in contempt for not agreeing to the check off, because it was upon this rock that the negotiations finally split. It was because of this that the union broke off and refused to continue negotiations. The law does not authorize the Board or us to make collective bargaining contracts nor to prescribe what shall be written in them."

NLRB v. *Whittier Mills Co.,* (6th cir.), 123 Fed. (2d) 725 at p. 728

This is the only possible holding consistent with the intent of Congress. This is the only possible holding consistent with the philosophy well stated by this Court in the following passage:

> "The National Labor Relations Act was not intended to empower the Board to substitute its judgment for that of the employer in the conduct of his business. * * * The Act does not vest in the Board managerial authority."
>
> *NLRB* v. *Union Pacific Stages,* (9th cir.), 99 Fed. (2d) 153, at p. 177

The Act leaves to the employer full liberty to decide what terms he will insist upon in his bargaining with his employees. This liberty marks the limits of the duty to bargain. The duty to bargain is to recognize the union, to negotiate with it, and to agree if mutually acceptable terms are discovered; the duty is to do nothing or say nothing which would make agreement on those terms impossible. The employer is under no duty to agree to unacceptable terms, and his failure to do so is no evidence of a failure to bargain, whatever opinion the Board may have as to the reasonableness of the employer's position.

C. The "good faith" which the duty to bargain collectively is sometimes stated to involve does not enlarge the scope of the duty.

1. The "good faith" to which the Courts have referred is no more nor less than a willingness to enter into a binding trade agreement on mutually acceptable terms if any are discovered.

The Courts have sometimes said that the duty to bargain must be performed "in good faith". While "good faith", without further definition, is a nebulous concept, the Courts mean something quite specific: "negotiate in good faith with the view of reaching an agreement if possible" (*NLRB* v. *Highland Park Mfg. Co.,* (4th cir.), 110 Fed. (2d) 632, at p. 637), "negotiate in good faith

with the view of reaching an agreement'' (*NLRB* v. *P. Lorillard Co.,* (6th cir.), 117 Fed. (2d) 921, at p. 924); ''negotiate in good faith with the purpose of coming to an agreement if possible'' (*Continental Oil Co.* v. *NLRB,* (10th cir.), 113 Fed. (2d) 473, at p. 480).

What is prohibited is a ''mind * * * hermetically sealed against the thought of entering into an agreement'' or ''a fixed intention not to agree with any proposal, irrespective of whether the proposed terms were otherwise acceptable'' (*NLRB* v. *Boss Mfg. Co.,* (7th cir.), 118 Fed. (2d) 187, at p. 189).

The ''good faith'' thus required of an employer in bargaining is no more nor less than an intention or willingness to discover what terms, if any, are mutually acceptable, and to contract on the basis of such terms.

2. The only conduct which would support an inference that the employer was unwilling to contract on mutually acceptable terms is conduct which would amount in any event to a breach of the obligation as already defined.

''Good faith'', so defined, does not enlarge the field of evidence which is substantial enough to support a finding of failure to bargain.

Good faith, as an intent not to agree on any terms, must be, unless expressly stated, at most an inference. Before any inference can be drawn by an administrative body, evidence must be introduced

> ''affording a substantial basis of fact from which the fact in issue can be reasonably inferred. * * * Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established.''
>
> *NLRB* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, at p. 300, 59 S. Ct. 501, 83 L. Ed. 660

Furthermore, in all litigation, whether civil or criminal, the law starts with the presumption that every man has obeyed it: *Bank of the U. S.* v. *Dandridge,* 12 Wheat. (U. S.) 64, at pp. 69 and 70.

Under these circumstances, evidence of conduct in which an employer has the liberty to engage cannot amount to a "substantial basis of fact" from which an illegal intent "can be reasonably inferred".

If an intent or willingness to agree is required by the Act, the law will presume that an employer possesses such an intent or willingness unless substantial evidence to the contrary is advanced. The only evidence which would reasonably support a contrary inference would be evidence of conduct clearly inconsistent with such presumed willingness to agree.

The only conduct which would be inconsistent with the presumption of a willingness to contract on acceptable terms would be conduct which amounted to a refusal to take some steps necessary to such agreement. If the record shows recognition of the exclusive authority of the union, full exposition of the terms on which the employer will insist, and acquiescence in terms mutually acceptable, the record has excluded the possibility that the employer has by his conduct made agreement impossible.

This argument has judicial sanction as well as logic to support it. Evidence of conduct which is no more than the exercise of the liberty left to the employer by the Act to decide unilaterally upon the terms which will be acceptable to him has been held insufficient to support an inference of "bad faith":

> "Respondent rejected this article in its entirety. It was not compelled to contract for an increase in the salary of its employees and no inference of bad faith can be drawn from this rejection."
>
> *NLRB* v. *Knoxville Pub'g Co.,* (6th cir.), 124 Fed. (2d) 875, at p. 880

Logically, then, the only evidence which would substantially support a finding of lack of good faith is evidence of conduct which would constitute a breach of the duty as we have already defined it.

II.

The Order to Bargain Collectively Must Be Set Aside Because the Undisputed Facts, As Found By the Board, Show Affirmatively That Wards Fulfilled Its Duty to Bargain Collectively.

(Arguing Specifications of Error 1 and 2)

If the definition of the duty to bargain which is here advanced be the correct one, then the very facts found by the Board demonstrate affirmatively that Wards fully performed its duty to bargain collectively.

A. Wards recognized the exclusive authority of the Unions to speak and contract on behalf of all Wards' employees in the proper units.

Wards never challenged the Warehousemen's majority after certification. As to the Clerks, while Wards had not, at the time of the negotiations, recognized the propriety of the unit claimed, it had, in the words of the Board, "negotiated jointly with the Retail Clerks and the Office Employees' Union" (R. 29-30) and

> "During the negotiations the respondent did not dispute, and in fact accepted, the majority claim made by the Retail Clerks" (R. 32).

Wards' good faith is borne out by its willingness to forego proof of majority:

> "The respondent agreed to accept the Retail Clerks' statement that it represented a majority of the clerks" (R. 35).

(Note that, despite the dispute over the proper unit, no question of representation was raised even after the strike had taken place, and a majority of the Clerks had remained at work: Ward's Ex. 21, R. 750).

B. Wards entered into a full discussion of Union demands, explained its own position, made known the terms on which it would insist, and participated in a discussion full enough to avoid the possibility of any misunderstanding.

Barr's instructions to Powell on October 11 were

> "We stand ready to discuss with the Union each of their demands and to explain clearly and frankly the Company's position in regard to each demand. You may further tell the Unions that they can consider your statement of the Company's position as a counterproposal if they desire; * * * " (R. 35; see R. 626-7).

Again, on November 22, Barr wrote Powell:

> "Bargain in good faith. State the Company's position on the points raised honestly and frankly. Your statement of position may or may not, contain what might be considered a counterproposal" (R. 45; see R. 736).

The Board's findings show that Powell carried out his instructions faithfully.

> "At the October 22 meeting, the parties got no further than a discussion of the union-shop clause" (R. 36).

Powell told Dixon of the Clerks:

> "* * * Our counterproposal would be that the work of organizing the employees be done by the Union" (R. 36).

On November 12, dealing with the Warehousemen, "each of the 14 articles was discussed, with Powell setting forth the respondent's position on each article" (R. 38). Powell "submitted a list containing the minimum rates of wages then being paid by the respondent to its warehousemen, and stated that no changes would be made in the existing rates" (R. 40).

On December 13, with both Unions present, Powell told them:

> "that our proposal or demand at present was that the picket lines be removed and that the employees be allowed to return to work" (R. 50).

Powell added:

> "nor did the Company intend to make any other demands on the Union" (R. 50).

On December 14th, Powell, when asked if he had "a proposal to submit that might provide a basis for an agreement" replied that Wards "had nothing further to submit than the statement of its position in regard to each of the proposals theretofore submitted" (R. 51). Powell thus made it clear that Wards' statement of position constituted the terms on which it would insist.

On December 16,

> "* * * They proceeded to discuss the entire contract proposed by the Warehousemen. A similar procedure was followed with respect to the proposed contracts of the Retail Clerks and the Office Employees' Union" (R. 53).

The Board found:

> "Pursuant to its hypertechnical approach, the respondent was willing to meet with the Unions when requested, listen to their demands, and explain its position thereon. Further than that it refused to do * * *" (R. 63).

Thus the Board admits that Wards participated in a discussion which permitted both sides to expound their position fully, and which left no room for mutual misunderstanding as to the terms on which the parties were insisting.

C. Wards agreed to demands which were, in fact, acceptable.

The Board described the ending of the last of the bargaining session in these words:

> "At the close of the conference, Ashe stated that the clauses of the contracts to which the respondent objected primarily were those providing for any union shop, any increase in wages, a seniority rule, or any form of arbitration, and stated further: 'We aren't getting any place; we might as well call it quits'" (R. 54).

Thus the substantial issues all involved demands for a change in the *status quo*.

The Board notes that, at the meeting of November 12,

> "Powell did indicate tentative acceptance of some articles of minor importance with certain modifications, particularly when the terms as agreed to would not conflict with the *status quo*" (R. 38).

The Board thus recognizes the clearly evidenced willingness of Wards to agree on *status quo* terms.

D. Wards never was asked to embody acceptable terms in a written, signed contract.

No demand was ever made that Wards agree to and sign a contract embodying only acceptable demands. Wards never refused to do so.

E. Wards' willingness to enter into an agreement is evidenced by its willingness to make concessions from the status quo, which it was not compelled by law to make.

The Board recognizes this, but belittles it:

> "The only concessions made by the respondent, with possibly three exceptions, were such as would not alter the *status quo*" (R. 53).

The Board in a footnote states as to those three "exceptions":

> "There was no showing whether or not the respondent's agreement to these matters in any way altered the *status quo*" (R. 53).

although reciting Powell's testimony that "some minor concessions" were made. Obviously, all "concessions" represent changes from the *status quo,* and the Board's quibble illustrates the biased character of its fact-finding procedure.

The Board's own findings thus show affirmatively that Wards discharged its statutory duty to bargain collectively. Again quoting from Mr. Justice Wilbur's dissenting opinion in the *Carlisle Lumber* case:

> "We have thus a number of instances in which the respondent met with the committee of the union for the purpose of discussing the propositions advanced by the union. *This is collective bargaining per se.*"
>
> *NLRB* v. *Carlisle Lumber Co.,* (9th cir.), 94 Fed. (2d) 138, at p. 150, (cert. den. 304 U. S. 575, 58 S. Ct. 1045, 82 L. Ed. 1539).

As this Court has pointed out elsewhere, the provisions of the Act are not to be construed

> "As compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence."
>
> *NLRB* v. *Union Pac. Stages,* (9th cir.), 99 Fed. (2d) 153 at p. 177.

The Board's finding that Wards failed to bargain collectively either totally disregards these undisputed facts or else is based on a misunderstanding of the nature of the duty to bargain.

III.

None of the Nine Respects in Which the Board Found Wards Had Failed to Bargain Collectively Amount to Substantial Evidence of a Refusal By Wards Either to Recognize the Authority of the Union, Or to Discuss the Union Demands Fully, Or to Make Binding and Written Trade Agreements on Acceptable Terms.

In its "Concluding Findings" on the bargaining issue, the Board said:

> "We are of the opinion that the respondent failed in a number of respects to comply with its obligation to bargain collectively" (R. 58, 59).

The seven succeeding paragraphs enumerated nine such "respects". Making the fair assumption that these nine points recapitulate the strongest evidence in the record on which the Board's findings might be predicated, we propose to show that not one of them substantially supported the Board's findings.

The first, second, sixth, and ninth points described conduct which the Board regards as amounting to a violation of duty *per se,* while the other points were treated merely as evidence of want of good faith. The Board's final conclusion, after "reviewing the whole congeries of events", was that Wards did not "confer and negotiate sincerely * * * with an open mind and a sincere desire to reach an agreement" (R. 68).

We propose to show under this proposition III:

(a) that the Board misinterpreted the Act in holding, as to its points one, two, six and nine, that the conduct to which they refer constituted a breach of duty *per se;*

(b) that the Board misconstrued the scope of the duty imposed by the Act in its appraisal of the evidence covered by its nine points of conclusions;

(c) that none of the nine points referred to conduct which substantially supports any inference that Wards lacked that good faith willingness to contract on acceptable terms which the Act requires.

A. The Board in its first three points erroneously assumed that Wards was under a duty to agree to do what the law compelled it to do in any event.
(Arguing Specifications of Error 3, 4, and 5)

The first respect in which the Board found Wards to be disobedient was that Wards, "although requested to do so, did not agree to embody understandings that might be reached with the Unions in signed contracts" (R. 58). The phrase "did not agree" carries implications which the facts do not justify. Wards, when twice asked in advance of any agreement whether it would sign a written contract, merely replied that "the question of the form of agreement * * * is premature" (R. 34, 59-60, and 757). The Board held this to be *per se* a violation of the Act because it was "tantamount to a refusal to bargain altogether" (R. 60).

The Board's second point was that, while Wards offered to assert its recognition of the Union in a "preliminary whereas clause", it "refused to agree to a clause * * * by which the respondent *promised* to recognize it as exclusive representative" (R. 61, italics added). The Board also held this to be a breach of duty *per se,* construing the law as placing on Wards an "obligation to 'bind itself to give exclusive recognition'" (R. 61).

The Board's third point was that Wards' refusal to insert in the proposed contracts a promise not to discriminate against Union members because of Union activity "demonstrated its refusal to bargain collectively" (R. 62).

1. All three promises which were supposedly refused were promises to do that which the law compelled Wards to do in any event.

In *H. J. Heinz Co.* v. *NLRB,* 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309, the Supreme Court held that under the Act an employer is no longer free to refuse to embody agreements reached in a signed contract "on the request of the Union" (311 U. S. at p. 526). When Wards was asked on December 14 whether it "would be willing to sign an agreement which merely set out its present policies and practices" (R. 757), the Unions had not indicated that they would accept such terms. The question at most was a hypothetical inquiry as to whether, under circumstances not then appearing likely to occur, Wards would obey the law. Wards properly pointed out that the question was "premature" (R. 757). If this be "a refusal to agree" as the Board called it, it was at most a refusal to agree *in advance* to do what the Act might later command.

The so-called "refusal" of Wards to "bind itself to give exclusive recognition", was also at most the refusal *to agree to do* what the Act itself compelled Wards to do through the operation of sections 8 (5) and 9 (a), and *which Wards had already done in fact.*

Wards objected to an anti-discrimination clause, on the express ground that the matter was "covered by law and is not a subject of agreement" (R. 61; see R. 740 and R. 765). The clause objected to added nothing to the obligation imposed by section 8 (3) of the Act.

2. **The law vests no right in, nor imposes any obligation upon, an employer to bargain with respect to the duties which the law independently places upon him, and hence imposes no obligation to agree to do what the law compels him to do in any event.**

Obviously, duties imposed upon an employer by law, which he must in any event perform, and which he has not unilaterally and voluntarily determined to be satisfactory, are not terms to be arrived at by negotiation or bargaining. Asking an employer to agree to do what he is already bound to do is patently absurd.

The Fifth Circuit Court of Appeals has said:

> "* * * The subject matter of collective bargaining is rates of pay, wages, hours of employment, or other conditions of employment. A refusal to bargain about legislative policies and other generalities is not included."
>
> *Globe Cotton Mills* v. *NLRB,* (5th cir.), 103 Fed. (2d) 91, at p. 94.

In *McQuay-Norris Mfg. Co.* v. *NLRB,* (7th cir.) 116 Fed. (2d) 748, at p. 751, (cert. den., 313 U. S. 565, 615 S. Ct. 843), 85 L. Ed. 1524), the Seventh Circuit Court of Appeals was very explicit:

> "In the first place, the recognition required by 9 (a) is not a bargaining matter, as petitioner sought to make it."

This is the very case which the Board cites as authority for its contention that Wards was under a legal obligation to "bind itself" to recognize the Union (R. 57)!

A reasonable man, entering into a contract, would object to cluttering it with unnecessary clauses promising to do what will have to be done in any event. The Act did not contemplate, nor does it compel, the making of agreements which do not help to stabilize the terms and conditions of employment.

B. The Board's first three points as to Wards' supposed refusals to agree to do what the law compelled it to do furnish no support for an inference that Wards was unwilling to contract with the Unions on the basis of mutually acceptable terms.

1. No inference that Wards was unwilling to embody agreements reached in a written contract or that Wards' public announcement that it would do so was untrue can be drawn from Wards' insistence that the question of the form of any contract was premature before a meeting of minds had occurred.

The only two times the question of a written contract was raised were (a) on September 19, (R. 58) before acceptance of the claim of the Clerks to represent a majority on October 7th (R. 679); and (b) on December 14, (R. 757—not on Dec. 16, as stated by the Board, R. 58), after charges of failure to bargain had already been filed (R. 273 and R. 1). The question was obviously "premature" on September 19; and was obviously asked on December 14 for the purpose of entrapment. Wards' answer on December 14 simply reflects Wards' realization that the question was not asked by the Unions in good faith, since it related to *status quo* terms which the Union had consistently rejected.

Even if it stood alone, Wards' conduct in no way suggested that Wards was unwilling to sign a contract if mutually acceptable terms were agreed upon, and if the Union then requested it. Conduct not dissimilar has been approved by the Board itself:

> "We believe, however, that where further negotiations are contemplated, it is not inconsistent with the duty imposed by the Act to decline to enter into a written contract prior to the reaching of an accord as to all the basic terms then the subject of consideration."
>
> *In re Allied Yarns Corp.*, 26 NLRB, at p. 1451.

On the other hand the presumption that Wards intended to obey the law is corroborated by other uncontradicted evidence in the record:

(a) Powell wrote on November 13 to Barr, mentioning "the Court decisions which require that an employer is obligated to sign an agreement where he has reached a verbal agreement with the Union" (R. 744)
and questioning whether the same logic required the submission of counterproposals in writing.

(b) During the negotiations Wards discussed the form and wording of a possible agreement at great length. Powell's repeated suggestions that Union recognition be recited in a preamble rather than set forth as an article in the agreement (R. 737, 761-2, 556) are meaningless if a written contract were not contemplated. Powell also suggested verbal changes in several of the proposed contracts (R. 556, 557, 558, 531, 533, 738, 739, 741, 762, 764, 766, 768, 769), Powell objected to certain clauses only "as written" (R. 146).

(c) Some time before the hearing, Wards published a newspaper notice affirming its willingness to reduce any agreement reached to written form (Ward's Ex. 11, R. 651). *The Board omits to mention this undisputed fact in its findings.*

(d) Wards signed a contract with another A. F. of L. union at another location shortly after negotiations at Portland had reached an impasse (R. 705). *Wards had no policy against signed agreements.*

In the face of these uncontradicted facts, any inference that Wards, because it insisted that the form of any agreement was "premature", was negotiating "with its mind hermetically sealed against the thought" of entering into a signed agreement is absurd.

2. Even if the Board could infer that Wards did not intend to enter into a written contract, no inference can be drawn that such intent affected the negotiations in any manner; nor could any inference be drawn that Wards was unwilling to agree on acceptable terms.

The law never punishes a state of mind alone, but it punishes conduct resulting from or associated with that state of mind. The law never punishes a man who intends to steal a certain necklace should an opportunity occur unless he actually avails himself of such an opportunity; but the law considers the *animus furandi* as one of the elements of the crime when actually committed.

Consequently, the intent of an employer not to rehire an employee who has testified against it before the Board does not constitute a violation of Section 8 (4) of the Act unless the Employer, acting upon his intent, actually fails to rehire the employee when opportunity offers:

> "It is sufficient to say that the employer was never called upon to make this particular choice, and that no unlawful discrimination actually occurred. The National Labor Relations Act is not concerned with hypothesis, but with realities; it does not seek to prohibit an evil intent but unfair labor practices."
>
> *F. W. Poe Mfg. Co.* v. *NLRB,* (4th cir.) 119 Fed. (2d) 45 at p. 48.

By the same logic, the Act does not punish an employer for an intent not to bargain unless he fails to bargain when the occasion to bargain actually arises. Even if Wards did not intend to sign a written contract embodying the terms discovered to be mutually acceptable, it was never called upon to do so, nor did it announce in advance of negotiations that it would never do so. Hence, a mere finding of the existence of an intent not to do so would not support a finding that Wards had failed to bargain.

Nor could the Board infer from such an intent that Wards also did not intend to come to any agreement whatsoever. This would be basing one inference upon another in the most vicious fashion.

3. **No inference that Wards was unwilling to agree on acceptable terms can be drawn from Wards' insistence that the fact of recognition should be recited in the preamble to the contract rather than made a subject of agreement.**

> "* * * a signed contract or a statement in writing * * * serves both as a recognition of the union and as a permanent memorial."
>
> *NLRB* v. *Knoxville Pub'g Co.* (6th cir.), 124 Fed. (2d) 875 at p. 882.

A fortiori the recitation of recognition in a preamble to a contract serves the same purpose.

4. **No inference that Wards was unwilling to agree on acceptable terms can be drawn from Wards' refusal to agree not to discriminate against union members for union activity.**

(Arguing Specification of Error 11)

In holding that Wards' refusal was "without cause" and not "what reasonable and fair minded men are ordinarily willing to do" (R. 62), the Board clearly exceeded its powers by attempting to pass judgment on the "reasonableness" of Wards' position.

In any event, Wards' position was, by no test, unreasonable. The Union's express reason for asking for the clause was so specious as to make the demand obviously insincere; "a lot of the Union members did not know of a similar provision in the Wagner Act" (R. 765). No one today is so naive as to believe that Unions conducting organization campaigns leave any employee unacquainted with his rights.

C. The Board's fourth, fifth, and sixth points are based on the Board's misinterpretation of the duty to bargain as compelling Wards to offer concessions to union demands.

The Board prefaced its "Concluding Findings" with a definition of the duty to bargain which revealed that the Board believed that an employer must be willing to make concessions to union demands. This second erroneous interpretation of the law is the basis of the next three criticisms which the Board directs against Wards' bargaining tactics.

1. The Board's express definition of the duty to bargain includes a "willingness" to make concessions.

Saying (R. 54) that "the scope of the duty appears from our decision in *Matter of Singer Mfg. Co.*" (24 NLRB, on p. 444), the Board quotes the following passage from its opinion in the *Singer* case:

> "The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind and with a sincere purpose to find a basis of agreement concerning the issues presented" (R. 55-6).

To this sentence, the Board appended a footnote, saying:

> "Manifestly, in explaining the possibilities of reaching an agreement the open and fairmindedness and sincerity of purpose required by the Act contemplates an interchange of ideas, the communication of facts peculiarly within the knowledge of either party, personal persuasion, and *willingness to modify demands in accordance with the total situation thus revealed.*" (R. 56, italics added)

Obviously, the "open and fair mind" and "sincere purpose" which the Board would require of an employer must, in the Board's opinion, be demonstrated by "a willingness to modify demands". Such a willingness can of course be demonstrated only by the making of concessions.

2. The Board's fourth point, criticizing Wards' supposed "negative attitude", referred to Wards' interpretation of the Act as imposing no affirmative duty to offer concessions from the status quo.

Referring to three statements by Wards as to its interpretation of the duty to bargain, the Board said:

> "The respondent's declarations abundantly disclose an attitude inconsistent with its obligation actively to cooperate with the Unions" (R. 62).

The first declaration criticized was: "It is the union, not the Company, which is seeking an agreement". This statement is taken from Barr's answer of November 22 (Ward's Ex. 18, R. 733 *et seq.*) to Powell's request for guidance on the question of counterproposals, and followed these earlier comments:

> "We propose to fulfill our obligation to bargain with the Unions in good faith, but this does not pass to us 'the burden of going forward'. The initiative continues to lie with the union throughout the bargaining process. The only thing which will change our status in this regard is a change in our relative positions of such a nature as to induce us to seek some concession from the union" (R. 733-4).

Barr obviously meant that the Unions, not the company, were asking for changes in the *status quo*. In that sense, the initiative certainly lay with the Unions.

The second "declaration" was Powell's supposed statement that "his conception of negotiations was that the company had no affirmative duty to do anything and that it was up to the Union to please the company" (R. 62). In the light of Barr's instructions, Powell clearly was referring to Wards' consistent position that it was not going to make concessions from the *status quo* unless the Union demands were acceptable to it. Certainly Wards

did assume the affirmative duties which the Act imposes, such as recognition and negotiation.

The third "declaration" (R. 62-3) was a passage from Wards' brief before the Board setting forth the same arguments as to the nature of the duty to bargain as are set forth in this brief. *The Board's use of a legal argument by counsel as support for a finding that the latter's client had acted wrongly is unprecedented.*

3. The Board's fifth point, that Wards was "opposed to submitting to the Union's genuine counterproposals", identifies "genuine counterproposals" with proposals of concessions.

The Board admitted that Wards

> "was willing to meet with the Unions when requested, listen to their demands, and explain its position thereon" (R. 63).

But, to the Board, this was not enough:

> "Further than that, the respondent refused to go, and it persisted, rather, in the view that the obligation of taking further steps rested upon the Unions alone. Thus the respondent was opposed to submitting to the Unions genuine counterproposals" (R. 63).

Since to "explain its position" on Union demands was to state the terms on which Wards insisted, the duty to go "further than that" by making "genuine counterproposals" was no more nor less than the duty to offer concessions from the terms upon which Wards originally insisted.

4. The Board's sixth point, that Wards rejected union demands because "they were not consonant with company policy or practice" is based solely on Wards' insistence on the maintenance of status quo terms.

The next paragraph of the Board's conclusions reads:

> "Also illustrative of the respondent's bad faith in the negotiations is its repeated rejection of the union proposals on the general ground that they were not consonant with company policy or practice. We are satisfied upon this record that the respondent, *in thus relying simply on existing practice as a reason for not agreeing to union proposals,* failed to fulfill its obligation to discuss freely and fully their (the parties') respective claims and demands and, when these are opposed, to justify them on reason" (R. 65-6, italics added).

The Board could not have meant that Wards did not advance reasons why it did not offer concessions. Without attempting an exhaustive analysis, undisputed evidence in the record demonstrates beyond the shadow of a doubt that Powell spent much time advancing: (a) his *reasons* for Wards' opposition to the closed shop (R. 738, 820, 821); (b) his *reasons* why the nature of the business affected overtime (R. 738, 763); (c) his *reasons* why the company could not pay higher wages (R. 739, 756, 757, 758, 763, 764, 769, 770); (d) his *reasons* why the company could not agree to arbitration of discharges (R. 740, 765); and (e) his *reasons,* due to the nature of the business, why the holiday pay demand had to be modified (R. 742, 763).

Obviously, then, the Board meant that Wards failed "to fulfill its obligation" because it insisted upon the maintenance of existing practices.

D. The Board's fourth, fifth, and sixth points furnish no support for an inference that Wards was unwilling to contract with the Union on the basis of mutually acceptable terms.

(Arguing Specification of Error 12)

1. No inference that Wards was unwilling to agree on acceptable terms can be drawn from Wards' belief or assertion that it was under no duty to offer concessions to Union demands.

Since the record clearly shows that Wards took those "affirmative" steps—recognition, negotiation, explanation, and discussion—which the Act requires, what Wards said as to its interpretation of the Act is no more at best than evidence of an intention not to take other "affirmative" steps, such as making counter-demands upon the Union or offering concessions to the Union demands. This intention is not forbidden by the Act, however much it may differ from the Board's philosophy of labor relations.

The admitted facts are, that Wards, while under no legal compulsion to do so, did in fact offer certain concessions, however much the Board belittles them.

2. No inference that Wards was unwilling to agree to acceptable terms can be drawn from Wards' belief that the Act did not compel it to label its statements of position as "counterproposals".

Barr instructed Powell on October 11th:

> "* * * explain clearly and frankly the Company's position in regard to each demand. You may further tell the Unions that they can consider your statement of the Company's position as a counterproposal if they desire" (R. 626-7).

Again, Barr told Powell on November 22nd:

> "* * * we should not be unduly concerned over whether or not our statement of position contains what might be considered a counterproposal. * * * State the Company's position on the points raised honestly and frankly. Your statement of position may or may not contain what might be considered as a counterproposal" (R. 734).

Whether or not Wards ever labelled its position a "counterproposal", the fact remains, as was pointed out under Proposition II, that Wards made known to the Unions the terms on which it insisted. No inference of "bad faith" can be drawn from the fact that Wards may not have called its statement of position by the name of "counterproposals".

3. In view of the undisputed evidence that the terms on which Wards insisted were recorded in written form by the Union representatives, no inference that Wards was unwilling to contract with the Unions can be drawn from Wards' refusal to submit "counterproposals" in writing.

The Board attached significance to Wards' refusal to give the Unions "a written statement of terms which would be agreeable to the respondent" (R. 64). adding "The respondent has offered no explanation for its refusal to submit * * * written countersuggestions" (R. 65).

This last is an absolute misstatement of fact.

Powell told the Union on November 12 that:

> "I did not see any point in our submitting a written proposal until he could assure us definitely that the terms would be agreeable" (R. 743).

Powell then asked Barr for his opinion whether an employer, who has named his terms orally, must advance them in written form, adding:

> "It does seem useless to present our terms in writing when we are pretty sure they will not be accepted" (R. 744).

Barr's reply was, as quoted by the Board:

> "The purposes of bargaining are best served by oral negotiations. We need not state our position to the union in writing" (R. 44).

Wards' reasons for not submitting its terms in writing were thus: (a) that no useful purpose would be served so long as their prior rejection when stated in oral form made their acceptance unlikely; (b) that the purposes of bargaining would best be served by keeping the negotiations flexible through oral discussion. This reasoning has had the Board's own sanction in the past:

> "Bargaining in the field of labor relations is customarily carried on over the conference table at which the representatives of both parties confront each other and exercise that personal and oral persuasion of which they are capable."
>
> *Matter of P. Lorillard Co.,* 16 NLRB 684, at p. 696, enf'd: *NLRB* v. *P. Lorillard Co.,* (6th cir.), 117 Fed. (2d) 821 (revd. on another point, 314 U. S. 512, 62 S. Ct. 397, 86 L. Ed. 358).

Furthermore, the making of written "counterproposals" would in fact have served no useful purpose. The Unions had it in their power to record the terms on which Wards insisted, and did in fact so record them. Board's Exhibits 10 and 12 are copies of the contracts submitted by the Unions, used by union representatives for the purpose of keeping a written record of Wards' concessions, of the subjects on which agreement had been reached, and of Wards' position as to the appropriate wage scale and

other controverted matters. The union representatives had the right and the opportunity to keep similar records at all the bargaining sessions.

4. **No inference that Wards was unwilling to contract on the basis of existing policies and practices can be drawn from Wards' rejection of Union demands because they were "not consonant with company policy or practice".**

(Arguing Specification of Error 15)

The Board's sixth point (See R. 65-6) in reality emphasizes Wards' good faith, because, by rejecting demands which changed the *status quo* on the express ground that they did so, Wards clearly implied that it would insist upon the *status quo.*

E. The Board's seventh point erroneously assumed that an employer is deprived by the Act of the right to match dilatory tactics of the Union by similar tactics of his own, and that a two days' delay in negotiations with a Union which had previously delayed three months in presenting demands was evidence of bad faith.

(Arguing Specification of Error 13)

The next paragraph of the Board's conclusions described "further evidence" of Wards' supposed refusal to bargain. The first item was:

> "* * * Although the respondent had decided as early as November 26 to agree to the Chicago conference, the respondent deliberately postponed conveying this information to the Unions until November 28" (R. 66).

The Unions had taken their own time in presenting demands and in meeting to discuss them. The Warehousemen, certified on August 9, 1940 (R. 119-121), waited

until November 12, 1940, to hold a meeting. Both Unions were responsible for other delays in bargaining (see *e. g.,* R. 417, and 742). By dilatory tactics, the Unions waited until the beginning of the Christmas retail season to present their "ultimatum" or strike threat of November 25th, thus strengthening their economic weapon, the threat of strike.

The Act permits the employer to meet the Union's economic weapons by whatever action he feels necessary, such as closing his plant (*NLRB* v. *Sands Mfg. Co.,* 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 669), or by keeping it open and hiring new employees (*NLRB* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 58 S. Ct. 904, 82 L. Ed. 1381). By the same logic, the employer has the right to meet Union bargaining tactics with similar tactics.

Nor can the delay be made the basis for an inference of "bad faith". Wards did not intend to make further concessions (R. 746). Wards had already explained the terms on which it would insist. Certainly, so long as the Union had rejected these terms, and Wards did not plan further concessions, the delay is no basis for inferring that Wards was unwilling to agree on the terms it had already offered.

F. The Board's eighth point erroneously assumed that the Board had the power to pass judgment on the reasonableness of the terms upon which Wards from time to time insisted.

(Arguing Specification of Error 8)

The same paragraph of the Board's conclusions which discussed Wards' two-day delay referred to Wards' "inconsistent behavior" (R. 66) in supposedly changing its position on three matters during the course of negotiations.

1. The Board misstated the undisputed facts when it charged Wards with taking inconsistent positions as to Union demands.

(Arguing Specification of Error 14)

The Board first suggested that Powell conceded less than Barr instructed him to concede to the Union demand for overtime pay for time worked in excess of five hours between meals (R. 66-67). Barr, while he felt that "under normal conditions an employee should not be worked more than five consecutive hours", nevertheless told Powell:

> "There may be some peculiar situation in Portland at which Article 7 is aimed, and I would hesitate to express an opinion without knowing all the facts" (R. 630).

Powell, as the Board says, "at all times insisted that the respondent's past policy of not paying overtime for less than six consecutive hours' work be followed" (R. 67). Powell's insistence on maintenance of the *status quo* in no way implied that "under normal circumstances" employees did in fact work more than five hours.

The Board next claimed that Barr's instructions on November 22: "insist on a no-strike clause without qualifications or exceptions" "repudiated his prior instructions to Powell to use his own discretion in such matters" (R. 67). The facts were that Barr earlier told Powell that the first sentence of section 11 of the Warehousemen's proposed contract, prohibiting strikes, was "a sentence which we should probably insist upon being included" (R. 631). He added that Powell "should exercise his own judgment" on the third sentence of this clause (R. 631). Powell, exercising his judgment, objected to the third sentence "as it appeared to abrogate the Union's obligation under sentence #1". He reported the ensuing discussion to Barr, and asked Barr for "any

additional comments you may have in regard to Article 11" (R. 741). This evoked Barr's instructions of November 22. No "repudiation" whatsoever took place.

The third and last instance concerns Powell's statement on December 16 that he "did not believe we employed persons such as those mentioned" (R. 67; see R. 764) in Article 6 of the Warehousemen's contract covering special rates for "a working foreman, forelady, supervisor, or instructor" (R. 132). The Board supposed this to be inconsistent with a previous admission on November 13 that "we do have working supervisors" (R. 739). The two statements were not necessarily contradictory since (a) the facts might have changed in the intervening month; and (b) apparently Wards did not employ working foremen, foreladies or instructors.

2. Wards had the right to change its position as to union demands and to withdraw concessions at any time before agreement was reached and the Board was without power to pass on the reasonableness of such change in position.

The duty to bargain is the duty to agree to terms which are in fact acceptable to the employer. But, so long as the employer retains the liberty to decide what terms are in fact acceptable, this duty does not prevent an employer from changing his mind in the course of negotiations.

Nor is the Board empowered to examine into the sufficiency of the reasons for such a change in position, since an inquiry of this character is in essence an appraisal of the reasonableness of the employer's position and beyond the powers of the Board.

3. **None of the supposed inconsistencies supports any inference of an unwillingness on the part of Wards to agree with the Unions on acceptable terms.**

The fact that the positions taken were not in truth inconsistent removes the basis for any inference the Board might otherwise draw.

G. The Board's ninth point was based on the erroneous assumptions that the Act prohibits an employer from telling his employees that his plant remains open despite a strike and that doing so evidences a lack of willingness to reach agreement with the Union on acceptable terms.

(Arguing Specification of Error 10)

The last point of the Board's conclusions charged Wards with soliciting strikers "to return to work in violation of Section 8 (1) of the Act". This conduct the Board held to be also a *per se* violation of Section 8 (5), saying:

> "The respondent thereby violated its obligation to deal with the Unions as the exclusive representatives of the employees" (R. 67).

1. **Wards did not engage in any solicitation of strikers amounting to a disregard of the Unions' exclusive representation of Wards' employees.**

The day after the strike began, Wards' supervisors were handed a list of the names and telephone numbers of their employees, with instructions to call the employees, saying:

> "Since you were not at work today, I wanted to let you know that we are operating tomorrow as usual and your job is open for you if you want to come in" (R. 580).

These instructions were as follows:

> "(When you have made the above statement, listen for the employee's reaction to it. Do not make any further statement unless the employee asks some question. It is not possible to set out all the possible questions which you may be asked, but in answering the questions you should confine yourself to a repetition of the thought contained in the quotation above. When questions are asked, you may answer them frankly, but above all, do not in any way insist that the employee should come to work or intimate that their jobs will be in danger. The main purpose of this call is to notify the employee that the plant is operating and his job is waiting for him if he wants to come in)" (R. 580).

The Board, discussing the 8 (1) charges, held that, by merely making the telephone calls, Wards

> "was seeking to induce the striking employees to desert the Unions and to abandon their concerted activity" (R. 74) and was "undercutting * * * the authority of the Unions to act as the exclusive bargaining agents" (R. 74).

The situation is very similar to that in *Wilson & Co., Inc.* v. *NLRB,* (7th cir.), 120 Fed. (2d) 913, where an employer wrote his striking employees, announcing a reopening, and saying (p. 919):

> "* * * Those employees who do not report to work at their regular time, or furnish us some reasons other than the strike, will be assumed to have resigned * * * and other persons permanently engaged to perform their duties."

The Seventh Circuit Court of Appeals said (at p. 919):

> "The warning, if it may be termed such, which petitioner by this letter gave its striking employees as to what it proposed to do, was concerning matters within its legal province."

A fortiori, Wards was within its legal province in merely telling its employees the plant was open.

2. **Wards did not engage in any solicitation of strikers evidencing a lack of good faith on its part during negotiations.**

If Wards had the right to advise its employees that the plant was open, the fact that Wards did so cannot support an inference of "bad faith" of any kind.

Wards, when it made these calls, did not know which of its many employees not at work was a striker, or was home ill, or was home under a misapprehension that the plant was closed. The units represented by the striking unions included only a part of Wards' employees; and only a part of the employees in those units were union members.

The calls said "your job is open for you *if you want to come in*" (italics added). The instructions were: "above all, do not insist that the employee should come to work or intimate that their jobs will be in danger." The calls neither threatened the employees nor offered them inducements. The record does not show that a single striker was induced to desert the union.

If this be "solicitation", so is the mere keeping open of a struck plant, which impliedly invites striking employees to return to work.

H. None of the Board's nine points were substantial since none related to matters which afforded any serious or final impediment to the reaching of an agreement.

Within the scope of his freedom to refuse unacceptable terms, the employer has the *right* to chaffer or haggle as well as the *duty* to bargain. To hold that he must immediately reveal his minimum terms is to strip him of the right to chaffer effectively. Collective bargaining should not be reduced to protocol, but should be flexible,

leaving both parties free to advance arguments and positions without stopping to consider what inferences the Board might possibly draw from every phrase or statement.

For that reason, evidence of positions taken or statements made which were not the cause of a failure to reach an agreement can not support a finding of failure to bargain:

> "We do not think, however, that Beckerman's remark concerning a bond was advanced as a serious and final impediment to the consummation of a contract. Nor do we think that the union regarded it as such. We are convinced that the controlling factor in the breakdown of the negotiations was the inability of the parties to agree upon substantive terms. Accordingly we shall dismiss the complaint."
>
> *In re Beckerman Shoe Corp.,* 21 NLRB 1222, at p. 1235.

Such evidence does not rise to the status of substantiality:

> "* * * A reasonable mind would not accept the evidence of the mere fact of submitting a proposal as adequate to support a conclusion that respondents refused to bargain."
>
> *NLRB* v. *Grower-Shipper Vegetable Ass'n of Central California,* (9th cir.), 122 Fed. (2d) 368 at p. 373.

In the present case, the Board itself quotes the conciliator present at the last bargaining conference as summing up the "clauses * * * to which the respondent objected primarily" as those calling for a union shop, a wage increase, strict seniority, and arbitration (R. 54). These were the issues upon which the bargaining reached an impasse. *Not a single one of the Board's nine points relates to the issues on which the parties split.*

IV.

Even If the Record Contains Some Evidence Substantial Enough to Support a Finding of Failure to Bargain Collectively, the Order Should Be Set Aside and the Case Remanded to the Board Because the Board Appraised the Evidence in the Light of a Mistaken View of the Law.

(Arguing Specification of Error 16)

After reciting the nine "respects" in which Wards "failed to comply with its obligation to bargain collectively" (R. 58), the Board concluded:

> "Reviewing the whole congeries of events, we find that the respondent did not, as it was bound to do, 'confer and negotiate sincerely with the representatives of its employees * * * with an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation' " (R. 68).

The Board thus based its ultimate finding upon the total effect of the several specific acts which it believed evidenced a failure to bargain collectively.

A. This Court has the power to refuse to enforce orders of the Board which are based upon findings made under a mistaken view of the law and to remand such cases to the Board.

In *Ford Motor Co.* v. *NLRB,* 305 U. S. 364, at p. 373, 59 S. Ct. 301, 83 L. Ed. 221, the Supreme Court approved the rights of a Court to remand a case to the Board:

> "* * * The 'remand' does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law * * *."
>
> *Ford Motor Co.* v. *NLRB,* 305 U. S. 364, at p. 374.

In specific application of this principle, the Supreme Court in *NLRB* v. *Virginia Electric & Power Co.,* (Dec. 22, 1941) 314 U. S. 469, 62 S. Ct. 344, at p. 349, 86 L. Ed. 306, after discussing the principles of law applicable to the issues before it, said:

> "Here we are not sufficiently certain from the findings that the Board based its conclusion with regard to the Independent upon the whole course of conduct revealed by the record. Rather it appears that the Board *rested heavily upon findings* with regard to the bulletin and the speeches, *the adequacy of which we regard as doubtful.* We therefore remand the cause * * * for a redetermination of the issues in the light of this opinion" (Italics added).

Texas Co. v. *NLRB,* (9th cir.) 120 Fed. (2d) 186, is an application of the same principle by this Court.

The right to remand is generally recognized in the field of administrative law. Passages from two other recent decisions of the Supreme Court follow:

> "* * * *the factual inquiries and findings of the Board, made under a view of the law not our own, are quite likely not in all respects those which the Board would have made had it proceeded with knowledge of our opinion,* and are in some respects ambiguous for the purpose of decision in accordance with it. Accordingly, we reverse the decision by the United States Court of Appeals for the District of Columbia and remand these cases to the Board for further proceedings not inconsistent with this opinion." (Italics added.)
>
> *District of Columbia* v. *Murphy,* and *District of Columbia* v. *De Hart,* (Dec. 15, 1941), 314 U. S. 441, 62 S. Ct. 303, 86 L. Ed. 277 at p. 311 of Supreme Court Reporter.

> "***We would not disturb those conclusions if only a question as to the weight of the evidence was involved. But *we are not satisfied that the Commission applied the proper criterion* in reaching its conclusion.

"***But once the territory has been defined, the statutory test of whether an applicant was a 'common carrier' by motor vehicle in 'bona fide operation' during the critical periods is the same for the irregular and the regular route carrier. *We are not confident that the Commission has approached the problem in that way.* For it has repeatedly stated beginning with Powell Brothers Truck Lines, Inc., 9 M. C. C. 785, 791-792, that: * * *

"*The precise grounds for the Commission's determination* * * * *are not clear. It is impossible to say that the standards which we have set forth were applied to the facts in this record.* * * * Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. *If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away.* * * * Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence * * *." (Italics added.)

U. S. et al. v. *Carolina Freight Carriers Corp.*, ... U. S., 62 S. Ct. 722, at pp. 727-730, 86 L. Ed. 622

In none of the cases cited did the Supreme Court decide that the record was devoid of substantial evidence to support the administrative finding; the Court simply did not presume to decide whether, under a correct view of the law, the administrative agency would have reached the same decision as that attacked before the Court. Nor did the Court feel called upon to find an obvious and certain error in the view of the law held by the agency before remanding the case. To the Court, a remand was neces-

sary if the Court was "not confident" that a proper view of the law had been held, or if the Court "was not satisfied" that the agency had applied the proper criteria.

The principle of law may be stated in these words: Whenever an administrative finding has been made, or possibly may have been made, under a view of the law which differs from that of the Court, the case should be remanded so that the administrative agency can reappraise the facts in the light of the correct interpretation of the law. When one or more of the findings upon which the agency has "rested heavily" may have been influenced by such a mistaken view of the law, the reviewing Court should not assume the responsibility of determining the extent to which the error of law affected the final decision, but will require the administrative agency to do so.

B. The Board drew its conclusions in the present case under a mistaken view of the law in several major respects.

This assertion has already been clearly demonstrated by our discussion of the nine points on which the Board based its conclusions. Even if we are wrong as to one or two of them, a single mistake of law as to the fundamental duty would contaminate and undermine the whole decision.

C. The Board's mistaken view of the law so affected its findings that its Order should not be permitted to stand.

Take, for example, the Board's mistaken belief that the refusal of Wards to decide in advance of agreement that a written contract should be signed was "tantamount to a refusal to bargain altogether". In "reviewing the whole congeries of events", the Board, as a trier of

facts, naturally gave great weight to evidence of conduct which in its opinion directly amounted to a violation of law. The Board's appraisal of the weight of the balance of the evidence was doubtless directly affected by its misconception of the duty to bargain in this one respect alone.

The Board's mistaken beliefs that it had the power to pass judgment on the reasonableness of Wards' answers to Union demands and that Wards was under a duty to offer concessions must equally have affected its judgment upon Wards' conduct of negotiations.

The Board's completely indefensible view that Wards violated the law by telling its employees that the struck plant remained open for business would, by itself, invalidate the Board's final conclusion. The mistaken assumption that Wards' deliberate act was wrongful could not help but color and affect the Board's ultimate conclusion that Wards acted in bad faith.

The Board's errors of law thus were inextricable from the Board's ultimate conclusion. This reason alone should persuade this Court to set aside the challenged order, even apart from the complete insufficiency of the evidence to support a finding of failure to bargain.

V.

The Order As to Interference, Restraint, and Coercion Lacks Substantial Support and Should Be Set Aside.
(Arguing Specifications of Error 18 and 19)

The findings as to an 8 (1) violation are predicated (a) on the telephone calls by supervisors to strikers telling them the plant remained open for business, and (b) on certain statements by McGowan.

We have already shown that the telephone calls were within the scope of the ruling in *Wilson & Co.* v. *NLRB,* (7th cir.), 120 Fed. 913, at p. 919.

As to the supposed statements by McGowan the Board found that McGowan's acts were unauthorized, since, as to them, McGowan "went beyond" his "instructions" (R. 70). The record does not show any knowledge on the part of Wards of this breach of instructions. Under these circumstances, Wards was not "responsible" within the rule of *International Assn. of Machinists* v. *NLRB,* 311 U. S. 72, 61 S. Ct. 83, 85 L. Ed. 50; *NLRB* v. *Link-Belt Co.,* 311 U. S. 584, 61 S. Ct. 358, 85 L. Ed. 368; and *H. J. Heinz Co.* v. *NLRB,* 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309. While the technicalities of *respondeat superior* do not apply, some basis for responsibility must appear.

If supervisors are "emulating the example set by the management" (*Int'l Ass'n of Machinists* v. *NLRB,* 311 U. S. 72, at p. 81, 61 S. Ct. 83, 85 L. Ed. 50), or the management shows "apparent acquiescence" in the criticized activities (*NLRB* v. *Link-Belt Co.,* 311 U. S. 584, at p. 598, 61 S. Ct. 358, 85 L. Ed. 368), or the management, after being "advised", does not "correct the impression of the employees" (*Heinz Co.* v. *NLRB,* 311 U. S. 514, at p. 521, 61 S. Ct. 320, 85 L. Ed. 309), an employer is "fairly responsible" for the acts of his supervisors. But McGowan acted in breach of express instructions; his acts were not known to Wards, and hence were not "acquiesced" in; and Wards had no duty to "correct an impression" which it did not know had been created.

Respectfully submitted,

Stuart S. Ball,
619 W. Chicago Ave.,
Chicago, Illinois,
Attorney for Petitioner.